

United States District Court  
Southern District of California

Before the Honorable Jeffrey T. Miller  
United States District Judge

20 Official Interpreters: Ayderus Ali, CCI  
21 Official Court Reporter: Debra M. Henson, CSR, RPR  
U.S. Courthouse  
22 333 W. Broadway, Suite 420  
San Diego, CA 92101  
23 (619) 238-4538

25 Record produced by stenographic reporter

## 1 Appearances

2 For the Government: Laura E. Duffy  
3 UNITED STATES ATTORNEY  
4 William P. Cole  
5 Caroline P. Han  
6 ASSISTANT U.S. ATTORNEYS  
7 Steven P. Ward, Trial Attorney  
8 U.S. DEPARTMENT OF JUSTICE  
9 880 Front Street, Suite 6293  
10 San Diego, CA 92101

11 For the Defendants:  
12 (Mr. Moalin) Joshua L. Dratel, Esq.  
13 Alice Fontier, Esq.  
14 OFFICE OF JOSHUA L. DRATEL  
15 2 Wall Street, Third Floor  
16 New York, NY 10005

17 (Mr. M. Mohamud) Linda Moreno, Esq.  
18 LINDA MORENO, P.A.  
19 P.O. Box 10985  
20 Tampa, FL 33679

21 (Mr. Doreh) Ahmed Ghappour, Esq.  
22 LAW OFFICES OF AHMED GHAPPOUR  
23 P.O. Box 20367  
24 Seattle, WA 98102

25 (Mr. A. Mohamud) Thomas A. Durkin, Esq.  
DURKIN & ROBERTS  
2446 N. Clark Street  
Chicago, IL 60614

1 San Diego, California - Thursday, January 10, 2013

2 (Defendant A. Mohamud is being assisted by a Somali  
3 interpreter.)

4 THE CLERK: Calling matter 1 on calendar,  
5 10-CR-4246, USA versus Basaaly Saeed Moalin, Mohamad Mohamad  
6 Mohamud, Issa Doreh, Ahmed Nasir Taalil Mohamud, set for  
7 motion in limine hearing.

8 MR. COLE: Good morning, your Honor. William Cole,  
9 Caroline Han, Steven Ward for the United States.

10 THE COURT: Thank you.

11 MR. DRATEL: Good morning, your Honor. Joshua  
12 Dratel with Alice Frontier for Mr. Moalin.

13 MS. FONTIER: Good morning, your Honor.

14 MS. MORENO: Good morning, your Honor. Linda  
15 Moreno on behalf of Mr. Mohamad Mohamud.

16 THE COURT: Good morning. Thank you.

17 MR. GHAPPOUR: Good morning, your Honor. Ahmed  
18 Ghappour on behalf of Mr. Issa Doreh.

19 THE COURT: Good morning.

20 MR. DURKIN: Morning, Judge. Tom Durkin on behalf  
21 of Ahmed Nasir Taalil Mohamud.

22 THE COURT: Thank you. Again, good morning to  
23 everyone, including all of our ladies and gentlemen who are  
24 here observing in the back. We're set for a number of  
25 different things. I think --

1 MS. MORENO: Your Honor, I'm sorry. Mr. Moalin is  
2 not out yet.

3 THE COURT: Okay. All defendants are present.  
4 Thank you. Good morning, gentlemen. We're good to go?  
5 We're here to address several matters today. We have motions  
6 in limine we'll get to in a little bit. I did want to start  
7 by picking up where we left off last time with discovery  
8 related matters and just seeing where we are in terms of  
9 preparation for trial. And so, assuming that's acceptable to  
10 everyone, let me start out by asking where we are in the  
11 preparation of deposition transcripts.

12 The reason I'm going to express a certain level of  
13 concern right now is that the last time we were here, I think  
14 everyone fully anticipated that the deposition transcripts  
15 would be prepared by this point, they'd be color-coded by  
16 this time and submitted to me so that I at least could have  
17 begun the process of reviewing that testimony which may be  
18 subject to objection. I haven't received anything thus far;  
19 hence, I'm concerned about what the status is of deposition  
20 testimony. So who would like to begin at this point? Mr.  
21 Cole, Mr. Dratel?

22 MR. DRATEL: I can begin, your Honor.

23 THE COURT: Sure.

24 MR. DRATEL: The -- they've all been transcribed.  
25 And I think in our last phone conversation, we set today as

1 the date that we would actually submit them to the Court; I  
2 don't think that they were expected before today. And we did  
3 express some -- well, that -- they've all been transcribed.  
4 There was at some point a problem that the transcribers had  
5 missed one of the disks, and so we had to go back and get it  
6 from them, but that's all been taken care of.

7 The government has done its coding; we have that.  
8 I think it will take us another two days to finish our  
9 version. We obviously have multiple counsel going through it  
10 to -- for the purpose of just determining -- in fact, we're  
11 trying to make it easier on the Court in this sense. What  
12 we're trying to do is not just simply identify the objections  
13 that we made; what we really want to identify are the ones  
14 that we wish the Court to rule on. So there may be some that  
15 we withdraw because in the context of the examination, they  
16 either become cured by a follow-up question or less material,  
17 so we --

18 THE COURT: Right, you mentioned that last time.

19 MR. DRATEL: So we're narrowing it to what we want  
20 the Court to decide on. So I think by Monday we will be able  
21 to get the Court what we anticipated -- what we hoped we'd be  
22 able to get to the Court today.

23 THE COURT: By Monday?

24 MR. DRATEL: Yes.

25 THE COURT: And so you're envisioning by Monday I

1 will receive, for example, a transcript of a deponent that  
2 will be fully colored-coded, and it will be obvious based on  
3 what you're submitting by way of any objections that the  
4 objected-to testimony will be highlighted or identified in  
5 some way so that if a ruling is necessary, then I'll be able  
6 to do that.

7 MR. DRATEL: Correct.

8 THE COURT: Okay.

9 MR. DRATEL: And I've also had a conversation with  
10 Mr. Cole about sort of the dynamic of how -- of the rulings  
11 in this sense, which is relevance objections may be premature  
12 to decide at all based on the fact that we don't have any  
13 evidence in the case yet; there may be some others that -- I  
14 don't know how self-evident they will be to the Court in  
15 terms of the basis for admission as opposed to the basis for  
16 objection. So I don't know how the Court wants to handle  
17 that. Perhaps we should schedule some time -- you know, this  
18 may not be an issue until the defense case -- but to go  
19 through. In other words, we may have something where we say  
20 admissible for a particular reason or that we have satisfied  
21 a certain evidentiary threshold for it that may not  
22 necessarily be apparent now, may not be apparent until we get  
23 to a certain point in trial where it becomes relevant.

24 THE COURT: Well, context is always important  
25 anytime the Court needs to rule on an objection, especially

1 an objection based on relevance or some other substantive  
2 grounds, so you're absolutely correct; to the extent that  
3 objections would be more apparent and placed in context in a  
4 better light after some evidence has come in, then obviously  
5 the ruling should be deferred until that point. So I imagine  
6 there are probably a good many objections that fall into that  
7 category; is that correct?

8 MR. COLE: Yeah. The United States doesn't  
9 disagree with that, probably anticipating perhaps after our  
10 case-in-chief, there might be an hour where we could go over  
11 some of those relevancy objections in the depositions. Your  
12 Honor by then will have heard our case, have heard opening  
13 statements, or we can wait until after their opening  
14 statements if they reserve, and we'll have a better idea  
15 because in that regard, we've given -- as mentioned, we've  
16 given all our color-coding to the defense. And the good news  
17 is that in 16 transcripts that there are, sometimes there's  
18 entire transcripts with no objection interposed by us at all  
19 that were --

20 THE COURT: How many transcripts did you --

21 MR. COLE: There are 16 transcripts. What happened  
22 is --

23 THE COURT: Sixteen?

24 MR. COLE: Yeah, 16 transcripts. Every time we  
25 changed the tape out, we would create a new transcript.

1                   THE COURT: How many pages of deposition are there  
2 all together -- that might be a bit more helpful -- in terms  
3 of what you're anticipating introducing? Do you have any  
4 rough estimate of --

5                   MR. DRATEL: Well, actually that's another issue in  
6 terms of -- when you say about admission because the pages of  
7 transcript do include some colloquy that we're going to try  
8 to scrub out in terms of what -- and then that would have to  
9 be corresponding on the video in terms of editing it out so  
10 that the jury would only see that which is relevant in that  
11 sense or we're going to put what's admissible and what a jury  
12 would see if the witness were appearing in court. And so I  
13 think my estimate would be that it would probably be that the  
14 -- what probably a jury would get is somewhere between -- I  
15 don't know -- about 600 to 900 pages would you say? I'm  
16 guessing because we haven't finished that process.

17                  MS. FONTIER: Yeah. Well, your Honor, you'll see  
18 when we give you the transcripts that the length of it -- it  
19 looks a lot more daunting than it is because the way that the  
20 transcriber did is they would put the witness's name and then  
21 write "foreign language" and then skip a space, write  
22 "interpreter" and then write like "no," and then skip a  
23 space. So there's very little testimony on every single  
24 page. But there were only six witnesses, and there were two  
25 that were of any real substantial length. One witness's

1 testimony's probably about four hours long, the other is  
2 maybe two -- Sheikalow -- yeah, maybe about two, two and a  
3 half, and the other witnesses ranged from half an hour to an  
4 hour. So it's not a substantial amount of testimony that  
5 we're talking about.

6 MR. DRATEL: Also, your Honor, also if I may just  
7 add to that that since the transcripts -- well, I mean it's  
8 just also transcripts won't have the -- obviously the Somali  
9 part is sort of less than what's on the video, the  
10 translation, the actual active translation.

11 MR. COLE: I would agree with counsel that it  
12 really isn't as much as it seems. And one thing -- two  
13 things I want to point to your Honor in this process are your  
14 Honor had requested a -- in addition to the color-coding,  
15 your Honor suggested -- I'm not sure if it was a requirement  
16 or not -- but suggested we prepare a two-column document with  
17 page and line number stating like the page and line number  
18 and the basis of the objection. I don't know if we needed  
19 that in addition to the color-coding or not. If we need that  
20 two-column document, these particular transcripts might  
21 not --

22 THE COURT: Before you go on to that, Mr. Cole, it  
23 would be helpful for this reason. It would be nice to be  
24 able to go through all of the deposition testimony, let's  
25 say, once on a read-through so that I have some context when

1 I'm ruling on objections, not just from evidence that's come  
2 in but from whatever the deposition testimony might be. So  
3 it would be nice for me to be able to go through all the  
4 deposition testimony first on a dry run, I get some kind of  
5 impression as to the totality of that individual's testimony.  
6 Then I go back and I look at what's being objected to. And  
7 you're right, page and line number cites in pleading format,  
8 objection -- you can entitle it "objections to deposition  
9 transcript" or whatever -- and then just indicate what the  
10 objected -- the objected-to testimony is and then a basis or  
11 bases for the objection. And that will assist me in getting  
12 through this process expeditiously.

13 MR. COLE: Agreed. And the reason I raise it is  
14 only is we're prepared to do that. These particular -- the  
15 transcribing service that was used did not put line numbers  
16 on any of the transcripts, so we let defense counsel know  
17 that as soon as we get line-numbered versions, we'll turn  
18 that around right away and we'll provide that.

19 The final comment I want to make is -- it goes to  
20 this issue of difficulty ruling on relevancy objections  
21 perhaps until there's more context. We -- it is hard to tell  
22 at times whether a particular witness -- maybe half of their  
23 testimony or maybe even their entire testimony, whether it  
24 would be relevant at all unless it's linked up somehow by the  
25 defense. And so we did want to -- we have color-coded

1 specific objections, but we wanted to reserve the chance when  
2 we're into the defense case to argue to the Court that  
3 perhaps a large block of the witness's testimony, perhaps  
4 most of the witness's testimony, would not be relevant at all  
5 depending on what the defense is and what -- and what the  
6 evidence has been in the case. So I just wanted to raise  
7 that factor. I don't think that -- that may not come up at  
8 all, but it was something that was difficult to address with  
9 color-coding unless you color-code -- like on a provisionally  
10 preserve -- a color-coding of an entire tape.

11 THE COURT: I understand that it's more in the  
12 nature of a motion in limine, although motions in limine like  
13 that are really broadly based are difficult to rule upon too  
14 for the exact same reason; certainly we have several motions  
15 in limine of that type here before me today, and I think  
16 you'll see that, generally speaking, it's really difficult to  
17 rule in advance on these motions. I can hopefully assist the  
18 parties by providing some guidelines and some rules of the  
19 road that are not set in stone and certainly not conveyed  
20 with any sense of finality, always with the ability of the  
21 Court to reconsider certain issues later on as we get into  
22 the trial and then more deeply into the trial.

23 MR. COLE: Yes, your Honor. And the last thing, I  
24 wanted to ask about this two-column document. I assume your  
25 Honor wants -- did not want speaking objections, just wants

1 us to state the basis for the objection, and if you want more  
2 argument, you'll ask for it. Or do you want it to be sort of  
3 speaking objection to that document? Maybe that's a --  
4 there's a spectrum there perhaps.

5 THE COURT: Yeah, it would be. If you feel that  
6 if -- one side or the other feels that a particular objection  
7 might be more easily understood with a little bit of context  
8 or a little bit of argument, then feel free to do that, okay,  
9 that's fine, but, you know, it's a matter of degree. You  
10 don't need to -- to submit all kinds of copious argument in  
11 connection with these objections. So basically what you're  
12 saying is I'm going to be getting these by next Monday. For  
13 all the deponents?

14 MR. DRATEL: Yes, your Honor.

15 THE COURT: Okay. One question I neglected to ask  
16 the last time we were together -- we were going through the  
17 process of how the depositions were taken. You had two  
18 videographers as I recall. There was a problem with one of  
19 the videographers or one of the machines at some point --

20 MR. DRATEL: It was a -- usual when the lawyers get  
21 involved in trying to run technology. I think -- I think we  
22 turned one camera off and didn't turn it back on when it  
23 resumed and then realized it. There was about 20 minutes  
24 there --

25 THE COURT: There was no stenographer present,

1 however --

2 MR. DRATEL: No.

3 THE COURT: -- with -- so this was -- these  
4 depositions went forward only with a videographer or  
5 videographers present?

6 MR. COLE: That's right. And the video -- the good  
7 news is -- I think defense would agree on it -- the good news  
8 is the video is very clear, the audio is very clear, and the  
9 government suspects that, generally speaking, these  
10 transcripts are really for the Court's benefit for ruling on  
11 objections because I believe the testimony is going to  
12 consist of just playing the video.

13 THE COURT: True.

14 MR. DRATEL: And, your Honor, yes, there are two --  
15 I always give -- my greatest experience with Rule 15 is that  
16 there are two purposes for the transcript. One is that, as  
17 Mr. Cole just said, which is obviously to get them in shape  
18 for the jury so that the Court can -- you know, the Court  
19 gets to make a ruling so now we know what's in there; but  
20 also the second is then to create a record of what is played  
21 for the jury because my experience is that the court reporter  
22 will not be taking down --

23 THE COURT: Correct.

24 MR. DRATEL: -- while the video is playing, so we  
25 need to know what the jury sees in a written form for any

1 kind of record that might be necessary beyond that.

2 THE COURT: And you're clear that the quality of  
3 the sound is very good so that a transcript may not be  
4 necessary?

5 MR. COLE: It's quite good. It was -- the camera  
6 was sitting just a few feet away from the witness, and we  
7 were all I think anxious to see how good it would be, and I  
8 was very pleased to see that you can hear the witness very  
9 well and the questions very well.

10 THE COURT: Okay. And there's no -- there's no  
11 rolling script with any of this as I --

12 MR. COLE: No.

13 THE COURT: -- understand, it's just of the  
14 videotaped deposition. All right. All right.

15 MR. DRATEL: Your Honor, may I have just one second  
16 to confer with Mr. Cole?

17 THE COURT: Sure.

18 MR. DRATEL: Just trying to get the mechanics of  
19 how we'd get the final version to the Court before I forget  
20 that.

21 THE COURT: Now, are you going to be submitting the  
22 objections too? Will each side be submitting its objections  
23 to the video testimony proffered by the other side?

24 MR. DRATEL: I think what we just discussed, your  
25 Honor, is that we will get our objections to the government,

1 and they -- since their obviously direct examinations were  
2 longer than the cross-examinations, it's less work to put  
3 ours. And we will send ours to the government. They will  
4 color-code it so you get one document. And since they're  
5 here and they can get it to you Monday, we don't have to  
6 worry about, you know, color scanning or things like that, so  
7 that way, trying to do that is -- that's what I was talking  
8 about, mechanics of how to -- the Court gets one document  
9 that has, you know, the government's in a certain color, the  
10 defense in a certain color.

11 THE COURT: Okay. That's fine. How about the  
12 objections, the pleadings themselves?

13 MR. COLE: The column document?

14 THE COURT: Yeah.

15 MR. COLE: Yeah. Well --

16 THE COURT: They're going to come in as well?

17 MR. COLE: They will, although we need these  
18 transcripts in line number format. They're Word documents.  
19 I think the defense -- I'll talk to defense afterwards  
20 about --

21 MR. DRATEL: See about the format.

22 MR. COLE: -- getting it onto pleading paper, the  
23 transcripts. We'll -- see, the thing right now, your Honor,  
24 is that the transcripts right now have no line numbers on  
25 them --

1                   THE COURT: That I understand.

2                   MR. COLE: -- and so --

3                   THE COURT: So you can't prepare the objections  
4 until you get --

5                   MR. COLE: Well, right. And I've been -- I can't  
6 -- I've been hoping to get the defense to do all that for  
7 these transcripts, but I think that we'll work out how that's  
8 all going to happen after this hearing.

9                   THE COURT: Okay. All right. Okay. Then what  
10 about the wire intercepts now -- that's another topic we were  
11 discussing last time -- and the progress of exchanging the --  
12 or identifying the wire transcripts to be utilized by each  
13 side and transcripts and all of that. Mr. Cole?

14                  MR. COLE: Yes, your Honor. We sent -- last week  
15 we sent -- might have been this weekend or early this week --  
16 but anyways -- last week -- last week we sent the defense a  
17 further reduced list of calls we're going to continue to use  
18 in our case-in-chief. They have those, that specific list  
19 now. Today they will be able to pick up, after this hearing,  
20 the actual clips from those specific calls that we're going  
21 to play in our case-in-chief.

22                  They have exchanged -- counsel have -- each of the  
23 various counsel have provided us with one or more transcripts  
24 that they think -- they have disputes with our translation,  
25 and so we have been conferring, to some extent, on a small

1 number of transcripts they raised to our attention, with them  
2 to see if there's any agreement on the translation. I think  
3 it's safe to say that we probably will reach agreement in  
4 some areas and some areas we won't, and there will be --  
5 there will be some portions of transcripts that I think are  
6 just -- there just may be disagreement on the translation,  
7 and both sides will have to call their linguist to testify.  
8 But it doesn't look right now -- counsel may have a different  
9 view, but it doesn't look right now that that's an epidemic  
10 problem. It seems fairly focused on the handful of  
11 transcripts that we've been receiving.

12 THE COURT: How many intercepts or pertinent  
13 intercepts are you -- have you whittled down to?

14 MR. COLE: I believe it's 82 that we'll be playing  
15 some portion of, and we -- I did a little sort of  
16 back-of-the-envelope check, and if you added up all clip  
17 time, it's less than -- I think it's between three to four  
18 hours of total audio time.

19 THE COURT: And do you have your transcripts -- I  
20 assume you have your transcripts of those excerpts already  
21 prepared.

22 MR. COLE: Oh, yes. And that's what -- that's what  
23 the defense -- we've had those prepared for a long time, and  
24 the defense has had them; but we'll produce them again today  
25 to show the specific clips that will be used from those

1 transcripts.

2 THE COURT: Okay. And what percentage of them are  
3 in dispute would you say --

4 MR. COLE: Well, we've received --

5 THE COURT: -- or what percentage of the total  
6 material, let's say, of three or four hours of total audio  
7 time may be subject to interpretation?

8 MR. COLE: Well, Mr. Dratel told me today that  
9 they're still going to get us a few more, but based on what  
10 we've received so far, I would say 1 percent.

11 THE COURT: Okay.

12 MR. COLE: But that -- that percent may increase  
13 when we get something from Mr. Dratel --

14 THE COURT: Okay.

15 MR. COLE: -- because we received a total of about  
16 eight or nine transcripts from the defense.

17 THE COURT: Mr. Dratel or Ms. Fontier?

18 MR. DRATEL: Well, I'll let Ms. Fontier because I  
19 think she's --

20 THE COURT: Sure.

21 MR. DRATEL: -- got more specific information about  
22 that.

23 THE COURT: Okay. Thank you.

24 MS. FONTIER: Your Honor, as I'm sure you're aware,  
25 this has been a lengthy and ongoing process and, you know, I

1 think I'm probably as frustrated as your Honor, if not more,  
2 about the slow pace at which we are receiving the full  
3 transcribe-and-translates that we're turning over to the  
4 government. The difficulty is that we're not -- we have had  
5 our linguist go through their transcripts in some regard and  
6 the bigger job that needs to be done transcribing and  
7 translating the entire recording in some instances, which  
8 when the government has provided us verbatim, they may be a  
9 couple of minutes long, and it's out of a 45-minute  
10 conversation and we need that entire -- we need that entire  
11 transcript, the transcription. So there are a lot more that  
12 we will be providing -- I wouldn't say a lot more, but there  
13 are several more calls we'll be providing an entire  
14 translation or an entire transcript of. So that is part of  
15 the slow process. But we are -- we have a call scheduled  
16 with our linguist, who just returned to the country I think  
17 yesterday. So we are hoping to get those in a much speedier  
18 process and get this done. Obviously we recognize the very  
19 short date. Hopefully there will not be issues with our  
20 translations, but I'm assuming the government will want their  
21 linguist to check over the full transcripts when we provide  
22 them as well.

23 As far as like disagreements, I wouldn't say that  
24 they are necessarily endemic, but there are certainly words  
25 that are translated in a specific manner that will come up --

1 that come up over and over again and I think will be an  
2 issue. An example of -- and to all of you in here who speak  
3 Somali, I apologize, but the -- there's a Somali word  
4 "gallo," which is typically written g-a-l-l-o, which in the  
5 government's translation is 100 percent of the time  
6 translated as "infidel," and we take issue with that  
7 translation, and that is something that comes up in multiple  
8 different transcripts and something that will be an issue for  
9 either linguist to discuss or for us to decide upon, but I  
10 anticipate that that will be a point of contention. And  
11 there are other transcripts that just have specific words  
12 that we have issue with and we don't believe was what was  
13 correctly said. And, again, we will confer with the  
14 government and try to whittle those down, but I don't know  
15 that they're going to be all resolved; I don't anticipate  
16 that happening.

17 MR. COLE: And in that regard, we'll obviously, as  
18 we get more -- as we start getting more transcripts, we'll  
19 keep looking at them, but this close to trial, it reduces the  
20 possibility of really having time to resolve these issues,  
21 but -- we'll do our best, but there's a lot to do between now  
22 and trial and we're receiving transcripts, you know, a week  
23 or two before trial and being asked to see if we can change  
24 ours or agree -- we'll do the best we can to work with them,  
25 but it becomes more difficult the closer we get to trial.

1 And also we -- because we likely will have some disagreements  
2 and assume those will have to be brought in front of the jury  
3 through linguists, we have not received any notification of  
4 who their expert linguists are going to be that are going to  
5 testify at trial, and we would request that notice.

6 THE COURT: Well, you know, I was going to raise  
7 that as an issue a little bit later on. You've brought it  
8 up, and I think you've brought it up in a proper context,  
9 we're still talking about discovery here, and I had that  
10 question as well, whether the parties have exchanged their  
11 lists of expert witnesses. That's something that wasn't  
12 specifically addressed in prior status conferences. You both  
13 talked about having experts, and I think actually even the  
14 defense has anticipated one of the experts to be called on  
15 history and general matters of geographic, political,  
16 cultural, and other concerns as they relate to the case that  
17 -- is it Bryden --

18 MR. COLE: Bryden.

19 THE COURT: So obviously there's been some  
20 communication here.

21 MR. DRATEL: Right.

22 THE COURT: Where are you on your exchange of  
23 experts?

24 MR. DRATEL: We just this morning sent -- I don't  
25 know if you saw it -- we sent a letter -- it should be in an

1 email -- to Mr. Cole this morning on our experts, Professor  
2 Abdi Samatar, S-a-m-a-t-a-r, to essentially cover some of  
3 the -- I don't want to say same ground as Mr. Bryden but sort  
4 of a counterpoint to Mr. Bryden as necessary. Obviously  
5 after Mr. Bryden testifies and after cross-examination, we'll  
6 always evaluate, as we always do, as to whether a defense  
7 expert is necessary, but we are planning on calling him, and  
8 we provided the --

9 THE COURT: Well, I assume both sides are going to  
10 be in compliance with the Rule 16 requirement here.

11 MR. DRATEL: Yes.

12 MR. COLE: Your Honor, I'll take a look at the  
13 notice. I don't want to act like there's an issue if there  
14 isn't one -- I have not seen the notice yet -- but, you know  
15 three weeks before trial to get this type of expert notice I  
16 think's a little short in a case that's been pending this  
17 long.

18 THE COURT: When did you give notice, Mr. Cole?

19 MR. COLE: Months ago, months ago. And that said,  
20 I don't want to -- I don't -- I just want to lodge that. I  
21 don't make a real complaint because I may look at the notice,  
22 it may be fine, I may have no complaints at all on this  
23 point, but I haven't seen it.

24 THE COURT: And this hasn't been raised as an issue  
25 before, but really, truly it is an issue and it must be --

1 this must be done. You're apparently -- you've got to know  
2 who your experts are, including linguists --

3 MR. DRATEL: Well, I think that's the only expert  
4 aside from the witnesses, your Honor, as far as I know.

5 THE COURT: Well, so be it, but --

6 MR. DRATEL: That's it. So I think --

7 THE COURT: -- provide to the government, Mr.  
8 Dratel -- today's Thursday, the 10th -- you can do this by  
9 tomorrow it sounds like in compliance with Rule 16.

10 MR. DRATEL: For the linguist, yes, your Honor.  
11 The other one we've already done.

12 THE COURT: With the linguist and with Samatar, so  
13 I think -- but let the government know what they need --

14 MR. DRATEL: Yes.

15 THE COURT: -- to know with respect to Samatar.

16 MR. DRATEL: Your Honor, we have -- obviously the  
17 linguist information in terms of a bilateral disclosure,  
18 that's one of the issues we have with respect to motions in  
19 limine, so we haven't gotten that from the government to a  
20 certain extent in terms of --

21 THE REPORTER: Mr. Dratel, I'm having trouble  
22 hearing you.

23 THE COURT: Yeah, why don't you use the microphone.  
24 Might make it a little easier --

25 MR. DRATEL: It's just that in terms --

1                   THE COURT: -- for the court reporter.

2                   MR. DRATEL: -- of the government's linguist, we  
3 have not gotten any information that would be useful for us  
4 in terms of preparation; again, that's one of the subjects of  
5 the motions in limine.

6                   Also just with respect to the telephone  
7 conversations, I just wanted to identify three aspects of it  
8 just to categorize them for the Court so that I think it's  
9 clearer as to what can be anticipated as to the potential  
10 areas of contest. One is that -- differences in translation.  
11 In other words, the government translator has it -- has one;  
12 we have it differently. That's a particular type. The  
13 second type is the --

14                   THE COURT: Would you repeat that, please.

15                   MR. DRATEL: Sure. That whether a translation is  
16 different from the government's version versus the defense  
17 version, an actual translation of Somali words into English.

18                   The second would be now that the government has  
19 identified more precisely that portion of a call that it's  
20 going to play, the defense may want to introduce other parts  
21 of the same call; that's the second issue.

22                   And a third issue is essentially calls that the  
23 government has not designated at all that the defense may  
24 want to admit from the ground up, so to speak, you know, that  
25 we have to create the transcript entirely. And obviously we

1 recognize this as a priority either that will get resolved in  
2 sufficient time so that Court has a chance to rule on it or  
3 the government has a chance to consider it and put only that  
4 which is necessary for the Court to decide obviously before  
5 the Court.

6 THE COURT: Well, this is what my expectations  
7 would be. With respect to the first category you mentioned,  
8 that you'd be able to get together and whittle down  
9 whatever -- whatever disagreements there are, and you've  
10 already indicated that, so to absolutely minimize those.  
11 Second, you're talking about the rule of completeness as I  
12 understand --

13 MR. DRATEL: That's correct.

14 THE COURT: -- what you were saying and Rule 106.  
15 And the case law is pretty clear on what the standard is for  
16 the rule of completeness to trigger the ability of the  
17 defense to have admitted another part of a recorded  
18 statement.

19 And then the third thing is, you know, raises  
20 obviously at the threshold hearsay issues that need to be  
21 addressed. And so it's really incumbent upon the defense I  
22 think to get that information, those intercepts that the  
23 government does not intend to utilize but you're intending to  
24 utilize to the government as soon as possible so that perhaps  
25 if the government has no objection, then we can move ahead

1 seamlessly with those; if there are objections, then I need  
2 to know about those as well. That's probably another  
3 category of objections or another category of evidence that  
4 can be dealt with in advance so that you can have some  
5 predictability as to what is and what is not going to be  
6 allowed going forward.

7 MR. DRATEL: And, your Honor, sometimes -- some of  
8 those transcripts have been turned over to the government,  
9 and I understand that the government has reviewed some of  
10 them and gotten back to counsel, that -- at least as far as  
11 the translation is concerned -- that some of them are --  
12 there's no controversy as to the translations themselves. I  
13 don't know about the rest of them. They still obviously look  
14 different and I think at this stage today premature simply  
15 because there's a certain contextual aspect to that as well  
16 even on the hearsay grounds. But I'll leave that for a time  
17 when it's in front of the Court.

18 MR. COLE: Your Honor, we do intend to include in  
19 our trial brief briefing on this rule of completeness versus  
20 hearsay problem. The Ninth Circuit case law providing the  
21 rule of completeness does not allow for admission of hearsay.  
22 And so we'll include a section in our trial brief about that,  
23 and we'll stand by for transcripts. As soon as we get one,  
24 we do our best to quickly turn it around, but we've received  
25 very few.

1                   THE COURT: Well, I think it's safe to say what  
2 Ninth Circuit controlling law is, that an exception to  
3 hearsay would be, under the rule of completeness, a part of a  
4 statement that has not been played by the proffering party  
5 that is inextricably intertwined with that part that was  
6 played. I think that's how 106 has been interpreted. Last  
7 case I saw on it is U.S. v. Ortega, which is a Ninth Circuit  
8 case. I believe it was out of the Eastern District of  
9 California. It's a 2003 case. I think it set forth some  
10 pretty comprehensive standards there, at least one case that  
11 comes to mind.

12                   MR. COLE: And, your Honor, and I -- I think that  
13 the Ortega case is in the trial brief that we'll be  
14 submitting, and others, but actually I think the Ortega and  
15 these other cases stand for the proposition that what is an  
16 out-of-court statement by the defendant himself is hearsay,  
17 it's hearsay, and the rule of completeness doesn't allow for  
18 its admission unless I suppose in a very unusual circumstance  
19 where somebody literally garbles -- you know, the portion we  
20 took out was literally sort of Hollywood edited to make it  
21 sound different than what was said. I don't think there's a  
22 provision that says because we played this part of a call,  
23 they get to play this entirely separate part of the same  
24 phone call just because it's in the same phone call. That's  
25 hearsay, and Ortega and a series of other cases since Ortega

1 I think have repeatedly said that that is not permissible.  
2 They have to show that's not hearsay. And if it's not  
3 hearsay and then for some ground it's admissible in its own  
4 right, they ought to do it in their case; they shouldn't be  
5 trying to put it in in our case.

6 THE COURT: Well, we'll look at the cases and we'll  
7 look at what kinds of statements you're talking about. As I  
8 recall, Ortega, for example, dealt with a confession, and  
9 part of the confession came in, and the part of the  
10 confession that came in through the government created a  
11 certain impression, and then what was left out was that part  
12 of the statement or that part of the confession that ran  
13 counter to what was admitted by or through the government's  
14 case-in-chief, if I have the case or the facts of the case  
15 correctly recalled; and the Court said well, because that  
16 second statement was inextricably intertwined with the part  
17 the government admitted, then in fairness to the defense, it  
18 should come in. Wasn't that Ortega?

19 MR. COLE: I have to go back and read what Ortega  
20 is -- I have to go back and read what the final holding was,  
21 whether it affirmed the district court for not admitting it  
22 or admitting it. But I know that Ortega says that the rule  
23 of completeness does not allow for the admission of hearsay,  
24 and so I have to -- I have to apologize. I don't know right  
25 now.

1                   THE COURT: No, it doesn't open up the door --

2                   MR. COLE: Yeah.

3                   THE COURT: -- to hearsay simply because one part  
4 of a confession --

5                   MR. COLE: Right.

6                   THE COURT: -- may be played. It doesn't open the  
7 door, for example, to everything that was said within the  
8 context of that interview.

9                   MR. COLE: Right.

10                  THE COURT: But where something is -- has been  
11 skewed or where it would be fundamentally unfair to keep out  
12 another part of that statement because it is -- I think the  
13 case used the terminology "inextricably intertwined," then it  
14 can be done under 106. But as I say --

15                  MR. COLE: I'll look back at that, your Honor.

16                  THE COURT: -- we'll take a look at those cases and  
17 issues as they arise. And, you know, this was another issue  
18 I was going to bring up, that is, trial briefs, the filing of  
19 trial briefs and jury instructions as well. We can deal with  
20 that a little later on, but to the extent we're going to be  
21 dealing with these issues, these legal issues and evidentiary  
22 problems, better that those trial briefs come in just as soon  
23 as possible.

24                  MR. DRATEL: Your Honor, not to argue the rule of  
25 completeness, just to make a point so that the government --

1 the rule of completeness is not a hypertechnical rule because  
2 the --

3 THE REPORTER: Mr. Dratel, I'm really having  
4 trouble hearing you.

5 MR. DRATEL: Okay. The rule of completeness is not  
6 a hypertechnical rule, and -- because the rule itself  
7 states -- I'll leave out the first part but just -- it says  
8 "which ought, in fairness, to be considered contemporaneously  
9 with it," it being the part that one party seeks to -- but  
10 we'll -- we'll have all that briefed and discussed. I don't  
11 want to detain the Court with that today.

12 THE COURT: Okay. So we were talking about experts  
13 I think when we went down into the rabbit hole here on the  
14 rule of completeness. We're done with experts --

15 MR. COLE: We just need to know I guess when we're  
16 going to receive the notice regarding the -- who, which  
17 linguist they're going to actually call to testify.

18 THE COURT: All right. Well, you're going to get  
19 that tomorrow. I assume you'll --

20 MR. DRATEL: Well, we -- the government should go  
21 first on that. We haven't received anything in terms of --  
22 other than the fact that they want us to assume --

23 MR. COLE: Well, we've given them the transcript of  
24 his prior testimony, which sets forth extensively his  
25 expertise and qualifications and background and experience.

1 And the only thing they don't have is his actual name, which  
2 we're ready to give to them today after we discuss that issue  
3 with respect to protective order and -- or get the Court's  
4 ruling on that. But they have his prior --

5 THE COURT: The Court's ruling on what now?

6 MR. COLE: This is the motion that had to do with  
7 we wanted the linguist to be able to testify, as he has done  
8 in prior federal court cases, under an assumed name, and we  
9 briefed that. The opposing counsel said they had no problem  
10 with that as long as they got his real name under protective  
11 order.

12 THE COURT: Right, right.

13 MR. COLE: And so -- but we've already given over  
14 his prior federal court testimony that sets out at length his  
15 qualifications and experience.

16 THE COURT: Okay. That's fine. So you ought to be  
17 able to do that tomorrow -- Mr. Ghappour, we'll get to you in  
18 just a moment here -- you ought to be able to do that by  
19 tomorrow, all right? Just have a mutual exchange tomorrow,  
20 rule -- just comply with Rule 16 by tomorrow --

21 MR. DRATEL: Thank you, your Honor.

22 THE COURT: -- all right, both sides. All right.  
23 Mr. Ghappour?

24 MR. GHAPPOUR: Your Honor, on the issue of  
25 experts --

1                   THE COURT: You want to use the lectern there?

2                   Might be easier for the court reporter and the others to hear  
3                   you.

4                   MR. GHAPPOUR: Just on the issue of experts, it's a  
5                   bit unclear to the defense whether or not Mr. Bryden -- the  
6                   plan for Mr. Bryden is to use him as an expert on Islam and  
7                   sharia. And to the extent that -- and in part that turns on  
8                   your ruling on the motions in limine. And so to the extent  
9                   that they are intending to use him as an expert on Islam, we  
10                  may have to introduce a counterpoint expert.

11                  THE COURT: Okay. Well, I assume that that's what  
12                  Mr. Dratel was talking about when he mentioned Mr. Samatar,  
13                  that Mr. Samatar would cover that area.

14                  MR. GHAPPOUR: I think that the -- there were  
15                  letters that were given to defense -- I think the latest one  
16                  was November 30 -- that in my opinion somewhat expanded the  
17                  scope of the expert's testimony, and that is when we made a  
18                  formal decision to pursue an expert such as Mr. Samatar. But  
19                  then the briefing, especially in response to Mr. Durkin's  
20                  motion in limine on sharia and sharia being used to identify  
21                  callers, we then -- depending on your ruling, in addition to  
22                  whether or not Mr. Bryden's going to be used as an expert on  
23                  Islam, we may have to introduce an additional expert for that  
24                  very purpose.

25                  THE COURT: Mr. Cole?

1                   MR. COLE: I think this issue got blown out of  
2 proportion, frankly, in the pleadings. The type of testimony  
3 Mr. Bryden would give that relates to Islam would be so  
4 rudimentary and basic and not controversial, I don't believe  
5 anyone here is going to disagree with it. He's not going to  
6 come and testify of all the ins and outs of Islam whatsoever;  
7 he's simply going to talk to very basic things about --  
8 which, frankly, were discussed by defense's own witnesses in  
9 their deposition in Somalia -- about the general -- the  
10 general type of Islam that was typically practiced Somalia,  
11 al-Shabaab's extreme offshoot, which their own witnesses said  
12 was completely extreme and out of bounds compared to other  
13 practices in their country. That's really basically it.  
14 There's not going to be a big discussion of the fine points  
15 of sharia law unless the defense wants there to be one, and  
16 so -- but the opinions that are going to be expressed by Mr.  
17 Bryden have been provided in notices and our pleadings.

18                   THE COURT: Okay.

19                   MR. GHAPPOUR: Your Honor, just to note, I've read  
20 Mr. Bryden's testimony in a Minnesota case. I disagree with  
21 it, just on the record --

22                   THE COURT: Well --

23                   MR. GHAPPOUR: -- as to sharia law.

24                   MR. COLE: Well, he might have testified to  
25 whatever he testified to in Minnesota. We just gave him a

1 prior transcript because that's his prior transcript. We're  
2 not planning to have him say everything here that he said in  
3 some prior courtroom.

4 THE COURT: Okay. Well, it might be helpful if you  
5 can identify those areas of testimony that he'll be delving  
6 into generally, in a general way, so that Mr. Ghappour knows  
7 whether or not he'll need to consider an expert himself. And  
8 that should be done -- once again, I'm envisioning this will  
9 be done, Mr. Cole, by tomorrow.

10 MR. COLE: Okay.

11 THE COURT: And then the defense exchange is going  
12 to come in -- or notice is going to come in tomorrow as well.  
13 Mr. Ghappour, if you need to augment that, then you -- you  
14 should do so just as quickly as possible or right after you  
15 have a chance to see what the government is going to be  
16 delving into with Mr. Bryden.

17 MR. GHAPPOUR: Absolutely.

18 THE COURT: Okay. Mr. Durkin?

19 MR. DURKIN: Judge, I just wondered, but -- I had  
20 something to say about sharia, but if we're going to address  
21 that later --

22 THE COURT: I don't think we need to get into that  
23 at this point. Thank you. All right. Okay. Any other  
24 issues relative to discovery that we can address at this  
25 point?

1 MS. FONTIER: Your Honor, I -- just going back to  
2 the calls and the transcripts that we're producing, I just  
3 wanted to mention that there are additional calls that the  
4 government has not translated that they provided to us in the  
5 1800, just -- and with just a brief general summary. I think  
6 with -- by Monday I can provide them a list of the calls and  
7 the call number that we're intending to introduce or have  
8 translated, and then they will have that list, but -- on that  
9 I can't get them a transcript of those by Monday, but I can  
10 give them like a list of the actual calls so that they have  
11 the same information that we have at that point.

12 THE COURT: They're already translated?

13 MS. FONTIER: They are not.

14 THE COURT: Well, how do you know --

15 MS. FONTIER: There's a general summary.

16 THE COURT: Just from a general summary. I see.

17 MS. FONTIER: Yes.

18 THE COURT: These are summaries that the  
19 government's already provided to you?

20 MS. FONTIER: Correct. There were 18 -- there were  
21 1800 calls that came with like anywhere from one line to two  
22 pages describing what the call is about, and some of those we  
23 think are very important to provide like context and  
24 background for what is being said on the translated calls,  
25 the verbatim calls that the government intends to use. And

1 to the extent we think those are relevant and admissible, we  
2 can identify those calls and say to the government these are  
3 the calls that we're having translated. They have the same  
4 information or more about those calls than we do, and we will  
5 provide a transcript as quickly as we can. But I can do that  
6 portion by Monday so that they know which call we're talking  
7 about.

8 THE COURT: Okay. This is what I'm going to ask  
9 you to do then, Ms. Fontier. For every intercept that you  
10 identify to the government as what you will be using or where  
11 there's the prospect of you using it, I'd like a copy of that  
12 plus the translation -- plus the translation -- no later than  
13 ten days before trial.

14 MS. FONTIER: Yes, your Honor.

15 THE COURT: Okay. That will be important to me  
16 going forward. Now, the reason I'm asking this is as  
17 follows. I liken this to the deposition transcripts, which  
18 I'll be able to review before trial and make rulings as  
19 necessary. I would anticipate with what you're now  
20 proposing, Ms. Fontier, there will be a significant number of  
21 objections from the government to anticipated transcripts,  
22 the additional transcripts of additional intercepts, and  
23 that's why I'm asking you to furnish to me a separate  
24 document entitled Proposed intercepts from the defense,  
25 identify them by call number, and then attach the transcripts

1 that you'll be providing to the government no later than ten  
2 days before trial. That will give me a pretty good running  
3 start at it. And we're getting close. Okay? All right.  
4 Anything else on discovery? Mr. Cole, anything that comes to  
5 mind?

6 MR. DRATEL: I should -- I'm sorry, your Honor.  
7 I'll let Mr. Cole --

8 THE COURT: Mr. Cole, anything that comes to mind?

9 MR. COLE: No, your Honor. Thank you.

10 THE COURT: Mr. Dratel?

11 MR. DRATEL: The classified information that the  
12 Court ordered released to the defense was disclosed to us, to  
13 me, by the Court -- your -- the court officer --

14 THE COURT: Would you use the lectern if you could.

15 MR. DRATEL: Oh, I'm sorry.

16 THE COURT: You're very soft-spoken, and so -- I  
17 know it helps the court reporter. Thank you.

18 MR. DRATEL: Just following your lead, your Honor.  
19 I don't have a microphone. The classified information that  
20 the Court ordered disclosed to the defense has been disclosed  
21 now to me alone because it was brought to New York, the  
22 materials. The rest of defense counsel will review them  
23 today after court. We may have a Section 5 -- I think it's  
24 likely that we will have a Section 5 CIPA application to the  
25 Court as soon as we can produce one because -- obviously we

1 can't do it in a public context, we have to do it in a SCIF,  
2 so it's going to be a little bit of a -- it's going to be  
3 cumbersome logistically, but we'll get it done, so that the  
4 Court has a chance to review this, as quickly as possible.  
5 But this was -- I saw that the -- last Thursday I guess, so  
6 it's a week ago today that I saw the materials, and obviously  
7 I haven't been able to discuss it with counsel on the  
8 telephone or in an email or any other kind of communication.  
9 So we'll do this as quickly as we can. It won't be  
10 complicated, but I think it may be necessary.

11 THE COURT: Anything else on discovery? Okay.

12 MR. DRATEL: No, your Honor.

13 THE COURT: All right. I think I've covered the  
14 issues I need to cover that are purely discovery related. I  
15 may need to discuss with the government something related to  
16 Jencks.

17 MR. DRATEL: Your Honor, may I -- may I just add  
18 something? I'll be going back to the classified part. I  
19 know that the government has recently, within I think the  
20 past week or ten days, filed at least one Section 4  
21 application with the Court, and we would just ask the Court  
22 -- obviously we object to ex parte, not being permitted to  
23 see and not being permitted to interpose argument, but we  
24 would ask the Court to perform the same review that the Court  
25 did the first time around based on the information that we

1 provided in terms of relevance and materiality to the defense  
2 and --

3 THE COURT: Absolutely.

4 MR. DRATEL: -- if the Court has anything -- has  
5 any questions of us as to -- because we have -- now have the  
6 ability to have some more precision and details now that  
7 we're another year into the case, if the Court has any  
8 questions, we'd happy to -- we'd welcome the opportunity to  
9 discuss with the Court in terms of relevance and materiality  
10 of any material that the Court is reviewing.

11 THE COURT: I always do that. I always undertake  
12 any review knowing what your request and your theory is in  
13 mind.

14 MR. DRATEL: Thank you, your Honor. We appreciate  
15 it.

16 THE COURT: All right. All right then. Why don't  
17 we move to the motions in limine and begin to address those  
18 and start with the government's motions in limine, take them  
19 in turn.

20 There's a motion to preclude defense based on  
21 duress, coercion, or necessity; that would be the first  
22 motion in limine. And I don't think -- as I read through the  
23 papers, I don't think the defense is disputing the  
24 government's argument may -- they're arguing the Court should  
25 not prematurely preclude the admission of evidence tending to

1 negate allegations that defendants intended to support  
2 terrorism. I see those as two very separate and distinct  
3 areas. I think the government is talking about the classic  
4 defense of duress, coercion, or necessity, and I don't see  
5 how that's in the case. This almost seems to be a moot  
6 issue. I don't know who needs to speak on behalf of this any  
7 further. Mr. Ghappour, did you -- looks like you're getting  
8 ready to --

9 MR. GHAPPOUR: Well, I'm not sure this is the time  
10 for it, but it's sort of -- the issue is related to what the  
11 government's theory of the case is with respect to Count 1,  
12 and so if the allegation is that the defendants had the  
13 specific intent to kill someone, we're not sure who exactly.  
14 We can probably raise a defense such as the defense of  
15 necessity if we were apprised as to what conspiracy to kill  
16 is being alleged in the indictment.

17 THE COURT: Well, I'm going to -- I'll grant the  
18 motion in limine without prejudice. And obviously if there  
19 is going to be a classic defense of duress, coercion, or  
20 necessity, the defense is aware of its obligation to make a  
21 *prima facie* offer of proof before that can be presented in  
22 any way, shape, or form going forward in the trial. Okay.  
23 That's granted, as I say, without prejudice. And I'll leave  
24 it to the defense to make that threshold showing of necessity  
25 before I would reconsider -- or coercion before I would

1 reconsider that. All right. Then there's a motion in limine  
2 to exclude all the witnesses except the case agent, and this  
3 is being objected to by the defense.

4 MR. COLE: Your Honor, I think -- I think I  
5 realized -- when I saw the response, I don't think I have a  
6 problem with their objection, which is -- I think what  
7 they're saying is they would want to --

8 THE COURT: Their experts.

9 MR. COLE: -- call an expert.

10 THE COURT: Yeah.

11 MR. COLE: Because I guess as long as both parties'  
12 experts --

13 THE COURT: It's got to be mutual --

14 MR. COLE: Right.

15 THE COURT: Any order that --

16 MR. COLE: Right.

17 THE COURT: -- I'm going to make with respect to  
18 exclusion of witnesses must be mutual. If both sides would  
19 prefer to have their expert sit in on the opposing expert,  
20 that's perfectly appropriate --

21 MR. COLE: Sure.

22 THE COURT: -- and that would relate to your  
23 substantive experts, if we can put it in -- Bryden versus the  
24 defense expert and your linguist as well.

25 MR. COLE: That's fine. Thank you.

1                   THE COURT: All right.

2                   MR. DRATEL: Yes.

3                   THE COURT: Acceptable?

4                   MR. DRATEL: Yes, your Honor.

5                   MR. COLE: Yes.

6                   THE COURT: Then I see this motion as moot. I  
7 think the parties are in agreement here. There's a third  
8 motion, to preclude evidence of punishment. That's granted;  
9 it's not opposed.

10                  There's a fourth motion in limine from the  
11 government to admit certified public records; that's  
12 unopposed as well, and, assuming that the evidence is  
13 otherwise admissible obviously, it comes in. There's no  
14 opposition, so the motion would be granted conditioned upon  
15 admissibility, relevance, for example.

16                  Okay. The fifth motion by the government is to  
17 preclude evidence of prior good acts as it's framed. I  
18 don't -- I don't need any argument on this. Certainly if  
19 counsel want to highlight anything or bring anything  
20 additional to my attention, you certainly may, but I'm ready  
21 to rule preliminarily on this. Mr. Cole, anything further?  
22 This is your motion.

23                  MR. WARD: Your Honor, I don't think we have  
24 anything further on that.

25                  THE COURT: All right, Mr. Ward. Thank you.

1 Anything further from the defense?

2 MS. FONTIER: No, your Honor. We addressed it in  
3 our papers.

4 THE COURT: Okay. This is basically a motion where  
5 the government is seeking to preclude defendants from arguing  
6 or soliciting testimony or evidence concerning specific good  
7 works or conduct in the community. And generally evidence of  
8 good conduct is not admissible to negate criminal intent, but  
9 those are boilerplate principles that we're aware of here.

10 The government is basically taking the position  
11 that the defendants may present evidence that they thought  
12 the money was going to charity but may not prove up specific  
13 instances of charitable or other good works in other  
14 respects. What the defendants are arguing here is that they  
15 will seek to offer evidence of specific charitable donations  
16 and that their -- they would be proffering evidence of  
17 specific charitable donations or humanitarian donations as a  
18 factual rebuttal of allegations and specifically allegations  
19 relating to intent.

20 I think -- I think generally evidence of good works  
21 or conduct is not admissible to negate criminal intent.  
22 However, if other evidence is limited to specific charitable  
23 donations which would support the inference that donations  
24 are intended for charitable, nonterrorist purposes, the  
25 probative value might outweigh concerns that general

1 character evidence based on conduct is generally  
2 inadmissible.

3 It looks to me, Mr. Ward, like this motion may have  
4 conflated two different principles here. You're looking --  
5 the motion is brought as a motion to preclude evidence of  
6 prior good works where we know, generally speaking, prior  
7 good works cannot serve as a basis for character testimony.  
8 Then we have 404 (b), and that raises an interesting issue  
9 here. If you look at 404 (b), evidence of prior acts, it  
10 allows -- I think it's worded in a criminal case the  
11 prosecution may introduce evidence of prior acts to prove  
12 knowledge, intent, absence of mistake, et cetera. And it all  
13 goes to intent, it all goes to knowledge.

14 If that be permitted for the prosecution -- and  
15 this is where I have -- I may have a question for you, Mr.  
16 Ward; you seem to have the laboring oar on this motion in any  
17 event -- if that be permitted for the prosecution, then why  
18 can't the defense offer specific acts of -- specific prior  
19 acts under 404 (b) -- which I think is what the intent here  
20 is -- of charitable contributions not as character evidence,  
21 not to show they're good guys, but to negate intent? In  
22 other words, why can't there be the rule that what's sauce  
23 for the goose is sauce for the gander, especially if the  
24 Court provides a limiting instruction to the jury that they  
25 may only consider it on the issue of intent?

1                   MR. WARD: Certainly, your Honor. I think all  
2 we're really talking about here is evidence of specific  
3 character of -- let's say it's charitable works that are not  
4 relevant to the transactions that are alleged in the  
5 indictment.

6                   THE COURT: Well, I think the defense is taking the  
7 position that -- that evidence of charitable donations,  
8 regardless of where these -- where the money is headed -- but  
9 let's just assume legitimate charitable works is relevant,  
10 that it doesn't have to be limited for legitimate political  
11 purposes or purposes -- or legitimate Somali organizations,  
12 but if one has -- if one has a history of charitable  
13 donations to -- you know, you name it -- I mean the Red  
14 Cross, the Somali Red Cross, down the line and those types of  
15 donations, regardless of the type of organizations, are  
16 targeted for legitimate charitable institutions that serve  
17 legitimate purposes, why can't that be?

18                   MR. WARD: I think it's simply because of the  
19 character -- the limitations on proving character under 405,  
20 your Honor.

21                   THE COURT: It's not character. But this is not  
22 character evidence. In other words, this wouldn't be  
23 permitted as a basis for character evidence, and the jury  
24 wouldn't be advised that they may consider this evidence as  
25 evidence of good character, they could consider it only on

1 the issue of intent or knowledge, more specifically intent.

2 MR. WARD: I think, frankly, it comes to a point  
3 that it's too remote in consideration of -- in relationship  
4 to the transactions that are alleged in the indictment. I  
5 mean if, you know, the Mafia don gives to, you know, the  
6 local church or the local soup kitchen, it still doesn't mean  
7 that he might not have been doing other things that are  
8 actually against the law. Then the defendant shouldn't be  
9 allowed to take specific instances of good works --

10 THE COURT: But is the charge against the Mafia don  
11 for providing material support in the form of money to a  
12 terrorist organization? Is that what the charge against the  
13 Mafia don is? Because if it is, then we have the same  
14 situation that we have here.

15 MR. WARD: I understand, your Honor. I still think  
16 that the way -- the way the rule is drafted is that you can't  
17 take a specific example of good works and then argue from  
18 that that you lacked the intent to commit the crime that's  
19 charged in the indictment unless of course you're focusing on  
20 transfers or organizations that they're dealing with in the  
21 country -- in Somalia I mean.

22 THE COURT: Well, what if it's not Somalia? What  
23 if it's Ethiopia as well? What if donations are going to  
24 Ethiopia for charitable purposes? Where do you draw the  
25 line?

1                   MR. WARD: I think all we're really trying to say,  
2 your Honor, is that specific charitable good works here in  
3 the United States are just not relevant to what's charged in  
4 the indictment so that, you know, the -- you know, what's at  
5 issue here, there's a drought relief committee as I  
6 understand it, and I think all of those are fair game.

7                   THE COURT: Excuse me for interrupting, Mr. Ward.  
8 Let's say there's a drought relief committee here and -- you  
9 say there's a Somali drought relief committee organized here  
10 in the United States that addresses drought relief in  
11 Somalia; is that what you're saying?

12                  MR. WARD: That's not what's going on here, your  
13 Honor. There's an organization over in Somalia itself --

14                  THE COURT: Okay. And it's -- what's the name of  
15 the organization? You know, once again, I'm dealing with a  
16 vacuum here. I don't know -- in other words, I don't know if  
17 there's specific charitable donations that have been made by  
18 any of the defendants, or all of them, to a legitimate  
19 organization here in Somalia -- in Somalia or, for that  
20 matter, here in the United States but related to activities  
21 in Somalia that would be completely legitimate and then would  
22 place this -- this question in issue. Who wants to address  
23 that from the defense? This is all theoretical at this  
24 point.

25                  MS. MORENO: Well, there is an organization that's

1 in evidence in the case; it's called ILYAS (sic).

2 THE COURT: Would you spell that, please, and would  
3 you use that -- the microphone. Thank you, Ms. Moreno.

4 MS. MORENO: Usually I have a pretty loud voice,  
5 but I don't want to get yelled at by the court reporter.

6 ILYAS, I-L-Y-A-S. It is an organization that does address  
7 the humanitarian crisis in Somalia, including -- excuse me --  
8 the drought and the famine situation there. It is in this  
9 case; there is evidence of it in this case. So it's highly  
10 relevant, if that helps the Court.

11 THE COURT: Is that what we're talking about here?

12 MS. MORENO: That's one --

13 THE COURT: I know you can't anticipate why the  
14 government filed this motion in limine, but is that the  
15 organization we're talking about and are there donations that  
16 were made?

17 MS. MORENO: It's one. It's one of the --

18 THE COURT: And where is that organization?

19 MS. MORENO: It's in Somalia, your Honor.

20 THE COURT: It's based in Somalia?

21 MS. MORENO: Correct.

22 THE COURT: And it's ILIA or --

23 MS. MORENO: It's ILYAS.

24 THE COURT: ILYAS. Is the government familiar with  
25 this?

1                   MR. WARD: Exactly, your Honor. And that's the  
2 point we're trying to make. If that's what the defense is,  
3 evidence like that is tied up with what's actually alleged in  
4 the indictment, we don't have any problem with that. We just  
5 think if you -- if one of the defendants helps little old  
6 ladies cross the street and they call some witness to say  
7 that, it makes it no more or less --

8                   THE COURT: Well, I don't exactly -- you brought up  
9 exactly, as I was going through this motion, the kind of  
10 thing I was thinking about myself and trying to place a wedge  
11 between the principles related to admissible evidence proving  
12 good conduct and 404 (b); and I was thinking well, does that  
13 open up the door if these individuals help old ladies across  
14 the street or they're coaching Little League teams or they're  
15 doing, you know, they're members of service organizations  
16 here, they're Rotary members? No, that doesn't, but I don't  
17 think that's what was being referred to by the defense in  
18 their opposition; they weren't talking about specific  
19 instances of charitable donations, which seems to me, to get  
20 to that 404 (b) question, not good character evidence.

21                   MR. WARD: I understand that, your Honor, and I  
22 think we're much closer -- the defense and the government are  
23 much closer in agreement than maybe all the pleadings made it  
24 sound. But certainly if it has to do with charitable works  
25 that relate to the disposition or the intent with which money

1 was forwarded, as is alleged in the indictment, I think  
2 that's all fair game.

3 THE COURT: Okay. Does that assist the defense  
4 here? If you're -- if these are the activities, if this is  
5 the evidence that you're referring to, donations to ILYAS, a  
6 Somali drought organization, then I think evidence of that  
7 type would be otherwise admissible under 404 (b) as it  
8 relates to intent.

9 MS. FONTIER: Yeah, I think that covers everything  
10 then, your Honor. Obviously we understand the rule of  
11 evidence. And I think the government's motion papers were  
12 just overly broad in what they were seeking to preclude. So  
13 to that extent, obviously, our opposition was more pointed.

14 THE COURT: That's a malady that both sides suffer  
15 from I think, overly broad motions. All right. So this is  
16 going to be denied insofar as the types of donations that  
17 have been discussed here today.

18 Okay. That brings up the sixth motion in limine  
19 brought by the government, to preclude pity or sympathy  
20 evidence, once again, a broad-based motion and difficult to  
21 rule upon in a vacuum. Basically the government is seeking  
22 to exclude evidence of defendants' health and upbringing,  
23 family circumstances, financial hardships, et cetera on the  
24 ground of relevance. And I think the government's trying to  
25 sweep into their concern or their limitation any evidence

1 relating to the lives, families, or circumstances of  
2 defendants in Somalia, arguing that this simply isn't  
3 relevant.

4 The defense has taken the position that it will not  
5 seek to offer irrelevant evidence that is merely offered to  
6 create pity or sympathy, but they'd like to introduce the  
7 historical perspective of the background of the defendants,  
8 their families, and the like as that would be critical to  
9 providing a jury with perspective in relation to defendants'  
10 motivations and conduct.

11 Generally I'm going to defer ruling on this to the  
12 time of trial, but this is one of those areas where I think  
13 it might be helpful if I could give just a little bit of  
14 guidance here. And, once again, we're dealing with a  
15 principle that I think applies for both sides. Both sides  
16 should be allowed to try their case with some context. The  
17 government shouldn't be required to put on its case-in-chief  
18 devoid of any of the social, political, and other related  
19 history of Somalia; it's got to provide some context for the  
20 country and these organizations. Likewise, I think that the  
21 defense should be allowed to humanize the defendants through  
22 properly admissible evidence, and this would include some  
23 evidence of the defendants' backgrounds so as to place their  
24 activities, their donations, their support for groups,  
25 terrorist or otherwise, in context. So I would not grant

1 this in whole; I would just defer and rule individually if in  
2 fact evidence proffered by the defense on the personal  
3 history of any of the defendants begins to go too far and  
4 does get into areas of pity or sympathy or inappropriate or  
5 unduly protracted historical perspective for any of these  
6 individuals. But as I say, you're allowed to get into that  
7 through admissible evidence. I don't know how that's going  
8 to be done. I don't know whether the defense is intending to  
9 call family members in for some of these limited areas or  
10 not. Anything you'd like to share with the Court and with  
11 the government at this point would be -- might be helpful,  
12 but I'm not -- I'm not requiring you to make any kind of a  
13 showing at this point. Ms. Fontier?

14 MS. FONTIER: No, we don't have anything at this  
15 point, your Honor. We just did not want to be absolutely  
16 precluded should it be -- come up and be relevant.

17 THE COURT: Okay. Well, you're not absolutely  
18 precluded. As I say, there would be an opportunity for you  
19 to provide some context for these individuals. Mr. Cole?

20 MR. COLE: Your Honor, I think we understand your  
21 ruling and are not questioning it at all, but we just want to  
22 flag this issue primarily because just as the defense did not  
23 proffer a necessity defense, we see -- the United States sees  
24 a real risk that there could be an effort to do almost an  
25 imperfect -- sort of an imperfect necessity, which is more

1 along the lines of a jury nullification, sort of argument  
2 that perhaps yeah, we were supporting terrorists, but what's  
3 the big deal, or it wasn't so bad, or it was the right thing  
4 to do, and none of that would be relevant to a legal defense  
5 to the charges.

6 So the defense -- I'm not -- sounds like we're  
7 putting words in their mouth -- they haven't done that, and  
8 we've heard Ms. Fontier. But there was a reason I think in  
9 this case in particular that to highlight at least for the  
10 Court that whatever the evidence is that's brought in about  
11 their personal histories or backgrounds, their families'  
12 personal history or backgrounds, be in fact tied to either  
13 rebutting an element of a charge or sustaining a legal  
14 defense and not just going towards nullification.

15 THE COURT: Okay. Thank you. The seventh motion  
16 in limine is to permit the government linguist to testify  
17 under a pseudonym. That will be granted upon the conditions  
18 that I think were reasonably requested by the defense or  
19 offered by the government, that is, that the defense receive  
20 the linguist's true name and that they can freely  
21 cross-examine the linguist; obviously they'll be permitted to  
22 do so at the time of trial, but otherwise the name of the  
23 linguist, the true name of the linguist, will be protected.

24 MR. WARD: Your Honor, may I --

25 THE COURT: Mr. Ward?

1                   MR. WARD: -- I have an order that addresses that  
2 if I could hand it forward to the Court. I provided  
3 copies -- I provided some additional copies for counsel.

4                   THE COURT: Have counsel seen --

5                   MR. DRATEL: I received one copy this morning that  
6 I -- before we started earlier, and I haven't had a chance to  
7 review it and certainly not to discuss it with my colleagues,  
8 so we're not in a position to take a position on it other  
9 than obviously we will try to -- if it needs to be amended,  
10 try to focus on that and not as a whole. I mean just from my  
11 quick review of it, it obviously incorporates some of the  
12 things that we talked about. I'm not sure the language  
13 itself is -- right now is the kind of statement where we  
14 would want it to be, but I'll have to discuss it with my  
15 colleagues.

16                  THE COURT: Okay. I realize there's some urgency  
17 here because the Rule 16 notice is to go over. I don't know  
18 that it would have to be in the Rule 16 notice, but in any  
19 event, I know you probably want this as soon as possible.

20                  MR. DRATEL: I think it's conceivable -- I doubt if  
21 the word's "conceivable" -- I think it's possible we can  
22 resolve by the end of the day.

23                  THE COURT: Okay.

24                  MR. DRATEL: It's that much --

25                  THE COURT: That's separate and apart from the

1 motion in limine though. The motion in limine is granted.

2 MR. DRATEL: Right.

3 THE COURT: Okay. All right. You can work on your  
4 order, but it's granted with the conditions that have been  
5 suggested. Do we need to address anything further along  
6 those lines at this point, Mr. Ward?

7 MR. WARD: Nothing, your Honor.

8 THE COURT: All right. The motion in limine is  
9 granted with the conditions that the true name will be  
10 provided to the defense and that full cross-examination will  
11 be allowed.

12 The eighth motion to -- motion in limine brought by  
13 the government is a motion to permit the government to recall  
14 witnesses. I would -- I don't know that there's an issue  
15 here. Obviously the Court controls the mode and manner of  
16 interrogation and witnesses being called. Upon good cause  
17 any party can recall a witness for a legitimate purpose.

18 What are you concerned about on this one, Mr. Cole?

19 MR. COLE: Your Honor, actually the concern has  
20 almost flip-flopped a little bit since we filed this motion.  
21 Mr. Bryden, the expert witness, resides in Africa, and  
22 therefore our ability to have -- we want to recall him -- in  
23 other words, have him give some testimony, let some other  
24 evidence come in to the jury, and then recall him. It winds  
25 up that because of his family situation and the distance he

1 is away from home, he's not probably going to stay around  
2 long enough to be recalled, and we're actually now going to  
3 have a reverse problem, which is needing to probably request  
4 the Court's permission to provisionally admit certain things  
5 so he can testify about them subject to us linking it up and  
6 getting it admitted into evidence.

7 THE COURT: And subject to a motion to strike if  
8 it's not linked up.

9 MR. COLE: Right. And so we were hoping to avoid  
10 that -- that latter scenario by having him just be recalled,  
11 but his schedule's not going to permit that, so we're going  
12 to have to just have him testify once.

13 THE COURT: Okay. Well, you want to withdraw this  
14 motion then?

15 MR. COLE: Yes.

16 THE COURT: Okay. It seems to be moot at this  
17 point, but you raised the issue, so --

18 MR. COLE: If we -- your Honor, if we recall  
19 anybody else, it will be so routine that it doesn't require a  
20 motion in limine before the Court.

21 THE COURT: Okay. Very good. Then I'll mark that  
22 one as moot; that's the eighth motion in limine. The ninth  
23 motion in limine is to permit references to al-Qaeda. And do  
24 you want to be heard further with respect to that?

25 MR. COLE: I think it's fairly well set out, your

1 Honor. This is another one that probably through the  
2 briefing became a bigger issue than we believe it's going to  
3 be. We tried to set out in the brief the very limited  
4 information that would be provided about the link between  
5 Aden Ayrow and al-Qaeda and al-Shabaab and al-Qaeda. If the  
6 Court had any questions about that, we can respond.

7 THE COURT: Okay. I've been through the papers,  
8 I've been through the cases that have been mentioned by the  
9 parties on this. Is there anything further from the defense  
10 on this?

11 MR. DRATEL: Your Honor, just one thing, which  
12 is --

13 THE COURT: Certainly.

14 MR. DRATEL: -- big; one mention is big for us.

15 THE COURT: One mention --

16 MR. DRATEL: You know, any -- bigger than what?  
17 Bigger than -- you know, for us it's a game changer once that  
18 word is mentioned.

19 THE COURT: Okay. Initially let me -- let me say  
20 this. The suggestion by the defendants in their opposition  
21 that the Court has already ruled upon this issue is incorrect  
22 if that was what was attempted to be conveyed. The Court at  
23 an earlier point in time, approximately -- it must have been  
24 about a year ago -- accepted the government's offer to strike  
25 the reference to al-Qaeda in the indictment as unnecessary at

1 the time. This is something the government was willing to  
2 do, and Mr. Cole, however, emphasized that he was reserving  
3 the option to address the point of introducing evidence of  
4 al-Qaeda upon a proper showing pretrial.

5 My concern at that particular point in time, at the  
6 time of that earlier status conference, was to eliminate the  
7 possibility of a reference to al-Qaeda, without the Court  
8 having a chance to address the issue in advance, of that  
9 organization being named in front of a jury in any way,  
10 shape, or form. And I think that the -- I think that if you  
11 look to the following pages of the transcript of that  
12 particular hearing that we had, you'll see that that was  
13 clearly understood by the Court and the parties, that the  
14 purpose at that time to have the government drop the  
15 reference to al-Qaeda was one of expediency and that we would  
16 reserve this issue for a later time. So apparently we're at  
17 that point.

18 So turning to the merits of the motion, once again,  
19 I start with a couple of preliminary observations. It's  
20 difficult to rule in an evidentiary vacuum, and any ruling  
21 now is preliminary in nature without prejudice to further  
22 consideration at a later time; and as important as a  
23 preliminary ruling might be on this particular question, I  
24 would like to be as helpful as I can to the parties at this  
25 juncture and provide some guidelines.

1                   First: I think under a 403 analysis, it is proper  
2 to consider what stipulation, if any, the defendants are  
3 willing to enter into; I think the cases support that, and,  
4 as I say, that is a matter that is relevant for consideration  
5 under a 403 balancing.

6                   Second: The government should be able to prove its  
7 case through the evidence it desires to use, assuming it is  
8 admissible and not unduly prejudicial. Both sides have cited  
9 the case of Old Chief, and Old Chief is still authority for  
10 that important principle.

11                  Third: The government in my view should not be  
12 unduly restricted in its presentation of the case by forcing  
13 the case to be tried in an evidentiary vacuum. It should be  
14 able to present appropriate context for the charges,  
15 including a clear picture of al-Shabaab structure,  
16 organization, and the general nature of its activity.

17                  In the absence of defendants stipulating that they  
18 knew al-Shabaab engaged in terrorist activity during the  
19 relevant time or times mentioned in the operative indictment,  
20 the government should be able to introduce evidence of the  
21 relationship, if any, of al-Qaeda and al-Shabaab. Any such  
22 evidence would -- and obviously it's assumed that Mr. Bryden  
23 would be the one through whom this type of evidence would  
24 come in -- but any such evidence would support an inference  
25 that al-Shabaab engaged in terrorism, that inference would in

1 turn tend to support an inference that any particular  
2 defendant knew that al-Shabaab engaged in terrorist activity,  
3 and that certainly is relevant for one or more of the counts  
4 in the case.

5 Next -- and I think this is very important -- any  
6 mention of al-Qaeda must be accompanied by two cautionary  
7 measures. The jury must be informed that no specific acts of  
8 terror committed or sponsored by al-Qaeda will be presented  
9 in any detailed or other unduly prejudicial manner. In other  
10 words, only the structure or the nature of the relationship  
11 between al-Qaeda and al-Shabaab, if any, would be permitted,  
12 and, importantly, no inordinate amount of time should be  
13 devoted to al-Qaeda.

14 Next: There should be cautionary instructions that  
15 would be given from the beginning to the end of this case  
16 with respect to the jury along the lines that the defendants  
17 are not charged with being members of or affiliated with  
18 al-Qaeda; and that there will be no evidence that any of them  
19 are members of al-Qaeda or affiliated with al-Qaeda or  
20 support al-Qaeda; and further, that any reference in the  
21 evidence to al-Qaeda may only be considered by the jury for  
22 its understanding of al-Shabaab and its activities. And if  
23 any juror, any prospective juror, has any difficulty with  
24 accepting those cautionary principles, then they're not going  
25 to be on this jury. It's that simple. So as I say, that's

1 preliminary, I hope it's helpful, but that's all I can do at  
2 this particular point in time. Mr. Cole?

3 MR. COLE: That's very helpful. And I only have  
4 two questions about the latter part, the cautionary  
5 instructions. One, you mentioned there will not be anything  
6 about -- I think it was anything about any -- any evidence of  
7 al-Qaeda attacks will not be presented in any prejudicial way  
8 I think is what your Honor said, something to that --

9 THE COURT: Right. If you read the cases that both  
10 sides have submitted, there was one case -- I don't --

11 MR. COLE: I know the one you're talking about, bus  
12 bombing in -- Hamas bus bombing.

13 THE COURT: Yes. And there Hamas and al-Qaeda were  
14 the organizations that were in play, and the charge was a  
15 similar charge to the charge we have here. And the evidence  
16 came in; the evidence apparently -- I don't know --  
17 photographs were introduced. I know you make something of  
18 that, Mr. Cole; you were saying no photographs of any -- no  
19 graphic photos will be used, introduced -- but there are  
20 other ways to put graphic evidence before the jury that can  
21 be very unsettling and unduly prejudicial.

22 MR. COLE: Yes.

23 THE COURT: And the Court listened to all of the  
24 evidence, that is, the appellate court listened to all the  
25 evidence that had gone on describing the horror of that

1 particular incident, that particular bombing, and they said  
2 this was over the line. So I think there is a line there,  
3 and the issue is what evidence is admissible to allow the  
4 government to try its case in context, allow the government  
5 to provide evidence of the named terrorist organization,  
6 al-Shabaab in this case, and the nature of it, general nature  
7 of its activity, which includes affiliation of -- with  
8 al-Qaeda, if that be the evidence -- I mean we've all read  
9 the newspaper accounts, we've seen the reports on television  
10 and elsewhere that al-Shabaab is an al-Qaeda affiliate. True  
11 or not, I don't know, but that will be dealt with by the  
12 evidence and only in a very general way and in a way that  
13 doesn't unduly prejudice the defendants.

14 MR. COLE: And that's no problem. That's a line I  
15 believe that we will stay far away from.

16 THE COURT: And it's a line that relates not just  
17 to the mention of al-Qaeda but also to the -- to any evidence  
18 related to specific incidents --

19 MR. COLE: Yes.

20 THE COURT: -- of terrorism in Somalia.

21 MR. COLE: Understood. Understood. The only other  
22 question I had about what you said, your Honor, was the  
23 cautionary instruction will be given about the defendants not  
24 having -- no evidence that they're being charged with being  
25 affiliated with al-Qaeda. That's all of course true. There

1 was one phrase in there though -- I guess we'll craft the  
2 cautionary instruction, we'll have a further chance to see  
3 the instruction itself because I was worried about one  
4 element of it that there will be no evidence that any  
5 defendant here supports al-Qaeda. We're not trying to prove  
6 they support al-Qaeda; but I don't want that, a statement  
7 like that, to suggest that they don't support because they  
8 very well may, and one could conclude from their behavior  
9 that they just might. It's not what they're charged with,  
10 but I just want --

11 THE COURT: That's not what they're charged with  
12 and there will be no evidence of that.

13 MR. COLE: Well, if they're --

14 THE COURT: They can support al-Qaeda in their  
15 heart or materially --

16 MR. COLE: -- but if they --

17 THE COURT: -- that's not the charge in this case.

18 MR. COLE: But if you support Aden Ayrow, knowing  
19 his links to al-Qaeda, I don't want there to be -- the jury  
20 restricted in the inferences it can draw from the evidence if  
21 they hear about Aden Ayrow, who he was, who he was connected  
22 to, and they hear the close connection of support that was  
23 coming from Mr. Moalin, for example, to Aden Ayrow, to  
24 somehow have to parse in their mind well, but wait, I guess  
25 the judge told me though that this -- what I'm hearing here

1 is not evidence of X. So what is it evidence of? They  
2 shouldn't be put in that position.

3 THE COURT: No, I don't think they would be.

4 MR. COLE: Okay.

5 THE COURT: I don't think they would be. The  
6 mention of al-Qaeda is so they can draw the inference -- I  
7 assume this is what the evidence will be; I'm --

8 MR. COLE: Yes.

9 THE COURT: -- not prejudging what the evidence  
10 will be, but the association of al-Qaeda with al-Shabaab  
11 allows the inference that al-Shabaab is a terrorist  
12 organization that engages in acts of terrorism.

13 MR. COLE: And if they draw that inference -- I  
14 didn't mean to interrupt you, your Honor.

15 THE COURT: That's all right. Go ahead.

16 MR. COLE: If they draw that inference, it would  
17 then be confusing. Okay, there's an association with  
18 al-Qaeda to Aden Ayrow, they're giving money to Aden Ayrow,  
19 the inference is they're aware -- or the inference they could  
20 draw is that they're aware Aden Ayrow's involved in  
21 terrorism. If that's the inference they're allowed to draw,  
22 then at the same time to come back and say there will be no  
23 evidence that they support al-Qaeda, that would be confusing  
24 because they'd think well, they must be giving money to Aden  
25 Ayrow for some other reason.

1                   THE COURT: You're into jury instructions already,  
2 and I'm not --

3                   MR. COLE: Sorry.

4                   THE COURT: -- I'm not there. All I'm saying is --

5                   MR. COLE: Okay.

6                   THE COURT: -- that the mention, the reference to  
7 al-Qaeda should be permitted at this point as far as I'm  
8 concerned, knowing what I know about the case, because it  
9 provides context for the type of organization and the type of  
10 activity engaged in by al-Shabaab; there's an inferential  
11 chain here, and so that's affirmative. What they must be  
12 advised of -- what the prospective jurors must be advised of  
13 early on is that these individuals are not being charged --

14                  MR. COLE: Right.

15                  THE COURT: -- with being members of al-Qaeda, not  
16 being charged with supporting al-Qaeda per se, that there'll  
17 be no evidence of any of that. And ultimately the jury will  
18 be instructed if the mention of al-Qaeda is made during the  
19 course of trial in an evidentiary context, how they may  
20 consider that evidence affirmatively, which I think may bear  
21 on your concern.

22                  MR. COLE: That's all, because the -- then I don't  
23 want to belabor it. The (a) charge is not tied to  
24 al-Shabaab. The (a) charge applies to any individual, any  
25 organization, if you give money to that person, just that

1 individual, with the intent to do certain things; and so the  
2 jury ought to be able to infer whatever they want about why  
3 money was being given to Aden Ayrow, because it's not tied to  
4 al-Shabaab, that charge. He happens to be an al-Shabaab  
5 member, but that's all I'm trying to say.

6 THE COURT: That's fair.

7 MR. DRATEL: Your Honor, I disagree. It's not the  
8 statute. The statute does not proscribe -- the (a) statute  
9 does not proscribe giving money or any material support to an  
10 organization; it's to a conspiracy. Al-Qaeda is not a  
11 conspiracy. The law is clear on this. It's a backdoor way  
12 of trying to do what the Court is trying to prevent, which is  
13 to get them to make the leap that because al-Qaeda is  
14 involved, that somehow these defendants are guilty regardless  
15 of whether or not the government's proved its case. I don't  
16 want to belabor it now. I think that Court -- the Court's  
17 analysis is clear for now, and I think -- but I don't want to  
18 make it seem like silence is assent. I disagree with  
19 virtually everything Mr. Cole said with respect to the uses  
20 of what the Court is permitting, which obviously we object to  
21 but we obviously are bound by the ruling, I'm just saying;  
22 but we're going forward in the context of the Court's ruling,  
23 we want to keep it as narrow as possible and as narrow as  
24 permissible and not permit it to leach elsewhere, which is  
25 what we're trying to prevent through responding to the

1 motion.

2 THE COURT: Well, I have this challenge I think  
3 from both sides of the case, both sides, permitting  
4 evidence -- there's a line for each side in the case,  
5 allowing each side to try its case, providing appropriate  
6 context or explanatory evidence but not crossing the line  
7 where it becomes unduly prejudicial to either side. So  
8 hopefully those remarks are helpful going forward.

9 MR. DURKIN: There's something I'd like to be heard  
10 on.

11 THE COURT: Would you like to use the lectern Mr.  
12 Durkin? Thank you.

13 MR. DURKIN: We might have gotten to this later. I  
14 think we sent you a letter about some --

15 THE COURT: Is this related to --

16 MR. DURKIN: It's related to the motion. What I'd  
17 like to do, in light of your anticipated ruling here and  
18 especially what Mr. Cole just said about the connection  
19 between Ayrow and al-Qaeda and whatever inferences might be  
20 drawn, I want to reraise -- I don't think my motion for  
21 prejudicial -- severance on prejudicial joinder under Rule  
22 14's been ruled upon, but I think I address or come close to  
23 addressing that very issue here when I talk in the motion --  
24 I don't want to belabor it now, but I'd like to reraise it.  
25 My client has no conversations with people in Somalia. His

1 only connection to this case is with Mr. Moalin, who I'm  
2 assuming they're saying is the one who's got the connection  
3 to Ayrow and therefore al-Qaeda. My client only talked to  
4 Moalin. He met the other two defendants at the MCC when he  
5 was arrested. That's his only connection to this case. And  
6 for him to run the risk of getting smeared by that issue with  
7 respect to al-Qaeda is just wrong.

8 I think -- I want to reraise it. I think I address  
9 it clearly enough in here. I didn't specifically include  
10 al-Qaeda in the motion, but I -- and I don't think it's been  
11 ruled upon, but I'd like you to reconsider -- consider it or  
12 reconsider it.

13 THE COURT: Well, I'll make a note of that. Thank  
14 you, Mr. Durkin. Appreciate it.

15 MR. DURKIN: Okay.

16 THE COURT: Okay. Let's move then if we can to the  
17 defense motions in limine. We've been at it for about an  
18 hour and a half now. Perhaps we can take a 15-minute recess,  
19 and then we'll resume with the defense motions in limine at  
20 that time.

21 (There was a break in the proceedings.)

22 THE COURT: Okay. Is everyone ready to proceed?

23 MR. COLE: Yes, your Honor.

24 THE COURT: All right. Getting to the defense  
25 motions in limine, the first motion is to permit foreign

1 depositions, and by this motion the defendants are moving to  
2 admit the six depositions taken in Djibouti; the government's  
3 not directly opposing this, and I know that in the motions  
4 the government made references to the transcripts being sent  
5 over to the government by -- I should say the defense made  
6 reference to the transcript being available by December 17.  
7 We are beyond that point. Obviously deposition testimony is  
8 coming in subject to individual rulings on individual issues.

9 MR. DRATEL: Just thought we should make a formal  
10 motion just to make sure that that was covered. It was more  
11 a formality, your Honor.

12 THE COURT: Okay. I think this is almost a moot  
13 motion in light of the agreements between the parties and  
14 everyone's understanding as to how the case will proceed with  
15 respect to depositions.

16 Okay. Next is a motion for a bill of particulars,  
17 and the defense is taking the position that a bill of  
18 particulars is necessary to ensure that they can adequately  
19 prepare for trial, arguing that the second superseding  
20 indictment does not identify or describe victims of terrorist  
21 attacks and therefore they cannot properly prepare, citing no  
22 identity of victims in Counts 1, 3, and 4. Government's  
23 opposing on the basis that the indictment need only state the  
24 essential facts necessary to apprise the defense of the crime  
25 alleged, and the government's representing that the second

1 superseding indictment alleges all of the essential elements  
2 of the offense and that the discovery as provided with all  
3 radio or audio recordings provides the defense with adequate  
4 information.

5                   In light of the second superseding indictment and  
6 the discovery produced by the government, I'm going to deny  
7 the motion. There's no -- there's no requirement that  
8 individual victims of any particular terrorist attack be  
9 identified in Counts 1, 3, or 4.

10                  With respect to the third motion in limine from the  
11 defense, that's to preclude evidence prior to February 26 of  
12 '08, the defense basically is arguing that the evidence  
13 regarding al-Shabaab prior to February 26 of '08, the date it  
14 was designated as a foreign terrorist organization, is not  
15 relevant and points out that about one-half of the telephone  
16 calls at issue and some money transfers predate February 26  
17 or -- yeah, 26 of '08.

18                  In the alternative, the defense is requesting a  
19 limiting instruction, and they also provide the text of that  
20 limiting instruction. Perhaps it would be appropriate to  
21 read it into the record at this time. It's as follows: You  
22 have heard evidence of events and conversations and donations  
23 that occurred prior to February 26, 2008. This evidence has  
24 been admitted for a limited purpose. It is only relevant to  
25 Counts 1 and 4. Evidence of events/conversations/donations

1 that occurred prior to February 26 of '08 may not be  
2 considered with respect to the allegation of whether the  
3 defendants individually provided knowing and intentional  
4 material support to al-Shabaab as is charged in Counts 2 and  
5 5.

6 The government responds that whether defendants  
7 provided material support to al-Shabaab, regardless of the  
8 date, vis-a-vis the FTO designation date, such evidence would  
9 be relevant because it bears on the knowledge and intent of a  
10 defendant, and it emphasizes that both before and after the  
11 designation date, al-Shabaab was an organization engaged in  
12 assassinations, bombings, and other acts of violence. The  
13 government's also arguing that certain relevant events  
14 occurred over a period spanning the designation date.

15 I am inclined to deny this motion, but at the same  
16 time, once again, this being one of those motions where we're  
17 dealing with lines and where to draw the line, what's  
18 properly admitted for allowing one side to try its case is  
19 again before us. I think that certainly an instruction at an  
20 appropriate time or at appropriate times would be in order  
21 here, essentially advising the jury that the jury may  
22 consider evidence of events or conversations or donations,  
23 i.e., activity prior to the designation date of February 26  
24 of '08 on the question of knowledge and intent of a  
25 defendant. However, the jury may not base any finding of

1 guilt as to either Counts 2 or 5 solely on events,  
2 conversations, donations that may have occurred before  
3 February 26 of '08. An instruction along those lines in my  
4 view would be appropriate. And was there anything more that  
5 anyone had on that?

6 MR. COLE: No, your Honor.

7 THE COURT: I can't craft the instruction right  
8 now, but I think that generally provides a helpful guideline.  
9 I think it allows for continuity of the evidence before and  
10 after, but it cabins the relevance of that evidence in  
11 appropriate ways. Mr. Dratel?

12 MR. DRATEL: Yes, we have nothing further, your  
13 Honor, on that.

14 THE COURT: Okay. Then the next motion in limine  
15 is the fourth motion by the defense, and this is to limit  
16 evidence of violence and terrorism. I'm going to deny this  
17 broad-based motion, and as previously stated, this is a flip  
18 side of the government's earlier motion in limine. Obviously  
19 evidence relating to context, history, general activity, and  
20 somewhat sanitized events, if in fact certain events are  
21 going to be referred to, without graphic details, without  
22 graphic depictions of violence or other matters such as what  
23 were discouraged in the case we had earlier -- let me get the  
24 name of that --

25 MR. DRATEL: Al-Moayad.

1                   THE COURT: Yes, that's it, that was the case,  
2 Al-Moayad, U.S. v. Al-Moayad, at 545 F.3d 139 and  
3 specifically at pages 159 and following. I think that -- I  
4 think there is some pretty good principles that are  
5 articulated in Al-Moayad that -- that could serve as a guide  
6 for us in this case.

7                   Okay. The next motion in limine by the defense is  
8 to exclude testimony as to the reasons for al-Shabaab's  
9 designation as a foreign terrorist organization. I don't see  
10 the issue here, quite frankly. Defendants are representing  
11 they will stipulate that al-Shabaab is designated as an FTO  
12 and that therefore testimony about the reasons for the  
13 designation is not relevant; and the government has taken the  
14 position that it does not intend to offer evidence about the  
15 specific reasons for the designation. That doesn't preclude  
16 evidence about the nature and extent of the structural  
17 integrity or lack thereof, I mean the --

18                   MR. COLE: Right.

19                   THE COURT: -- organization of it.

20                   MR. COLE: Yes, your Honor. And reading the  
21 defense's motion, we just want to make clear that if they  
22 thought we would sort of bring in the administrative record  
23 that led to the State Department doing the designation or  
24 talk about the deliberative process that the U.S. government  
25 relied upon in designating, we're not going to do that.

1                   THE COURT: Okay. I didn't think there was an  
2 issue.

3                   MR. DRATEL: The only -- I guess when I read  
4 Bryden's -- one of the letters describing Bryden's testimony,  
5 there was something in there about the designation itself and  
6 the process and, you know, questions of policy or importance  
7 to the United States or -- what the purposes are in that  
8 context is not relevant, and that's what we wanted to make  
9 sure was not on the table.

10                  THE COURT: Okay. I think we've got that  
11 clarified. I don't see that this -- I think this motion is  
12 moot at this point in light of the representations of  
13 counsel.

14                  MR. DRATEL: Thank you, your Honor.

15                  THE COURT: The sixth motion in limine is a motion  
16 to suppress statements of nontestifying co-defendants. And  
17 this is defendant Issa Doreh's motion, and it's a motion to  
18 suppress statements of co-defendants, identifying a potential  
19 Bruton problem, but the government's saying it has no  
20 intention of introducing such evidence, correct?

21                  MR. COLE: That's right. Postarrest statements  
22 we're not going to introduce.

23                  THE COURT: Okay. So this is moot. This is on  
24 your case-in-chief I assume, Mr. Cole.

25                  MR. COLE: Yes.

1                   THE COURT: Okay. The seventh motion in limine is  
2 a motion to exclude references to sharia law and other  
3 irrelevant evidence. And this is where there was a reference  
4 to Mr. Bryden that I saw. The objected-to areas are Bryden's  
5 proposed testimony about al-Shabaab goals and to impose  
6 sharia law and testimony about the murders of Analina Tonelli  
7 and Abdul Katar Yahya, or Yahey, which it is represented were  
8 each killed during Ayrow's tenure as an al-Shabaab leader. I  
9 think we've already handled the first part of this in your  
10 prior statements, Mr. Cole; you're indicating that the  
11 government has no intention of getting into any detailed  
12 explanation or mention of sharia law, that that's not --

13                   MR. COLE: The only -- the only way we see this as  
14 coming up is the fact that al-Shabaab is -- I mean it is a  
15 radical Islamist organization, so we really can't talk about  
16 it without to some extent talking about its objectives. But  
17 I think what triggered the defense motion I think is the  
18 transcript from Minnesota. We are not -- many of the  
19 references to sharia law were actually brought about by the  
20 district court in that case asking questions of the witness  
21 during trial that weren't even brought up by the government.  
22 We're not planning on introducing all that evidence in our  
23 case.

24                   THE COURT: Right.

25                   MR. COLE: It's going to be limited to explaining,

1 as necessary, what al-Shabaab is, what its objectives are,  
2 how it's far outside --

3 THE COURT: One of the objectives being to impose  
4 sharia law.

5 MR. COLE: Yeah, but not even -- I think the  
6 concern is sharia law is commonly used in Somalia anyways.  
7 It's its extreme version of Islam that is out of step with  
8 the mainstream.

9 THE COURT: I think both sides have reached some  
10 kind of an understanding as to what the government's evidence  
11 is going to be here, and if in fact the evidence delves more  
12 deeply into sharia law, Mr. Dratel -- it seems like you're  
13 getting ready to speak -- then we'll deal with those issues  
14 at the appropriate time.

15 MR. DRATEL: Okay. Because I just wanted to make  
16 sure that we understand and so that the Court understands,  
17 one is that we don't see the relevance of sharia law as an  
18 objective of al-Shabaab any more than any other organization  
19 in the context of this case. As to why it is relevant, we  
20 think it's purely prejudicial and designed that way.

21 Second thing is that while there may be one  
22 reference, even one reference, if it's fundamental and it's  
23 wrong, it's still something that needs to be either corrected  
24 or precluded. So I don't want to just say just because they  
25 ask one question and get one answer, if it's a fundamentally

1 incorrect answer from a witness who's not an expert in Islam  
2 but yet is taking this on, we have a problem. So we will  
3 address it at the appropriate time because we don't know the  
4 precise nature.

5 THE COURT: Anything further, Mr. Cole, in response  
6 to Mr. Dratel's --

7 MR. COLE: No, your Honor.

8 THE COURT: -- concern? Mr. Durkin?

9 MR. DURKIN: Judge, I agree, we can address it as  
10 we go on, and -- which is fine, but the only comment I want  
11 to make is that I don't think it's appropriate to interject  
12 here that sharia law somehow accepts a version where  
13 amputations are okay or whatever. That's a -- that would get  
14 into such a debate.

15 THE COURT: I don't know -- from what I've read  
16 from the government, that's not their intention, and I'm  
17 assuming there will be no references to those kinds of -- Mr.  
18 Cole?

19 MR. COLE: If to the extent -- to the extent that  
20 Mr. Bryden is -- testifies at all about that kind of violent  
21 behavior, it would be to say that that was al-Shabaab doing  
22 that, not that it is sharia law generally or that it is the  
23 other Somali culture or the culture of sharia law across the  
24 board; it would be talking about al-Shabaab.

25 THE COURT: And terrorist activities --

1 MR. COLE: Yes.

2 THE COURT: -- without getting into references to  
3 sharia or what sharia requires.

4 MR. COLE: Yeah, I mean unless -- I don't even  
5 know -- yes, that's right, your Honor.

6 THE COURT: Okay.

7 MR. DURKIN: And that's exactly what we were  
8 asking. It's one thing to say a group does A, B, C, and D.  
9 It's a whole 'nother thing to say they do it because they  
10 believe in a certain religious principle. It's the "certain  
11 religious principle" part of it that we're -- that this  
12 specific motion deals with. And the whole concept of sharia  
13 is far more complicated than simply sharia law; sharia is a  
14 whole cultural issue I mean.

15 THE COURT: Okay.

16 MR. COLE: Your Honor, I just want to say I think  
17 we're going to be on the same page here. The only thing is  
18 is the calls themselves, in order to understand who's  
19 talking, what they're talking about, there is going to be  
20 distinctions between groups in Somalia and their versions of  
21 Islam. That distinction was raised by the defense's own  
22 witnesses in Djibouti. They're going to, for instance, bring  
23 in testimony about al-Suhna --

24 THE COURT: You need to clarify that for the  
25 reporter.

1 MR. DRATEL: A-l, new word S-u-h-n-a.

2 THE COURT: Okay. We'll just defer ruling on this;  
3 I think that's all we can do, and I think you've made your  
4 points clear on this. And as issues develop, if they do,  
5 then we'll have to address them at that time.

6 MR. GHAPPOUR: Your Honor, just one more point.

7 I'm sorry. When you said that the government intends to  
8 introduce Mr. Bryden's testimony to distinguish between  
9 different types of sharia law -- and that is evidenced in the  
10 briefing -- he's not qualified to do that, and --

11 THE COURT: Well, I think that point has already  
12 been made though earlier today, and I think the government  
13 indicated it's not going there.

14 MR. GHAPPOUR: Well, in that case I can't  
15 understand what they're going to use him for based on my  
16 review of his prior testimony in addition to the briefing and  
17 what they just said they're not going to use him for.

18 THE COURT: Well, I don't know that the  
19 government's required to provide that information to you.  
20 But, you know, if the government doesn't prove its case, it  
21 doesn't prove its case. If the government's expert is  
22 ineffectual because nothing of any value has come out, then  
23 so be it, but -- I don't know how to respond to your  
24 statement that then if in fact sharia law is not going to be  
25 discussed by Mr. Bryden, you don't see the utility of

1 Mr. Bryden's testimony.

2 MR. GHAPPOUR: I guess the issue is I'm not  
3 entirely sure what is going to be introduced, and to the  
4 extent anything is going to be introduced about sharia law, I  
5 would contest his expertise, and at this juncture, two and a  
6 half weeks before trial, we're not really afforded an  
7 opportunity to do that. We weren't given notice that he was  
8 going to be used as an expert on Islam.

9 MR. COLE: Your Honor, we are confident that  
10 anything Mr. Bryden talks about, his expertise will be very  
11 apparent. And if Mr. Ghappour would like to voir dire him  
12 outside the presence of the jury on any point, we'd have no  
13 problem with that because his opinion's been turned over in  
14 letters and in his prior transcripts, and we're not concerned  
15 at all about his qualifications; he's extensively qualified  
16 for what we're going to call him for, and then Mr. Ghappour  
17 can voir dire him. There's been no Kumho motion filed or  
18 motion --

19 THE COURT: We're not proceeding with a Kumho  
20 hearing, but we can certainly -- anytime you want to take a  
21 witness on voir dire, not -- during the direct examination,  
22 you certainly may. It's not cross-examination, it's voir  
23 dire, and --

24 MR. GHAPPOUR: Thank you, your Honor.

25 THE COURT: -- that certainly is something that's

1 available to you. Okay. And then the government did not  
2 respond to the second part of this motion dealing with the --  
3 with these alleged murders. Did you want to -- what is the  
4 government's position on that?

5 MR. COLE: These are the -- oh, okay. The Tonelli  
6 and Yahya murders are only relevant and being offered -- I  
7 don't know why this came under the heading of religious  
8 violence. This one just goes back to the general motions  
9 that were briefed and discussed already today about  
10 al-Shabaab's activities. These were two of the most widely  
11 publicized events about al-Shabaab and Aden Ayrow leading up  
12 to the time frame at issue here, and so it's simply passing  
13 over those events by Mr. Bryden and explaining again these  
14 inferences that could be drawn by the jury as to what you'd  
15 be supporting if you're providing money to Aden Ayrow.

16 THE COURT: Okay. So it has no relevance to the  
17 religious component, the sharia motion.

18 MR. COLE: No.

19 THE COURT: All right. Okay. All right. I  
20 would --

21 MR. DURKIN: Could we have one second? Excuse me.

22 THE COURT: Sure. Go ahead.

23 MR. DURKIN: Judge, can Ms. Moreno address just one  
24 issue on that?

25 MS. MORENO: Just very briefly, your Honor. In

1 looking at the proffer letters that the government has given  
2 us with respect to what Mr. Bryden will testify to and in  
3 listening to Mr. Cole today, we have two different aspects.  
4 The murder of a nun and the murder of a nurse, which are  
5 these two examples, are tied to sharia, are tied to the  
6 violent form of sharia that the government claims al-Shabaab  
7 practices, and it's a particular virulent form of violent  
8 Islam, and that is the connection that their expert is going  
9 to make. So when Mr. Cole says well, it's not really under  
10 religious violence, it absolutely is. That is the context  
11 they gave it to us in. So it's not divorced. It's not just  
12 that this is some conduct, some murderous illegal conduct by  
13 al-Shabaab; it is fueled, in fact, given context and meaning  
14 of the violent form of sharia that Mr. Bryden's going to talk  
15 about. So what they've told us Mr. Bryden is going to talk  
16 about and what Mr. Cole tells us today is diluted. I mean  
17 d-i-l-u-t-e-d, not d-e-l-u-d-e-d.

18 THE COURT: There is a difference, yes.

19 THE REPORTER: Thank you.

20 MS. MORENO: Thank you.

21 THE COURT: Okay. Well, Mr. Cole can certainly  
22 speak for himself, but the impression I get is that evidence  
23 of these -- of these alleged murders are coming in  
24 generically as illustrative of the kind of activity, the kind  
25 of terrorist activity engaged in by al-Shabaab. I didn't get

1 the impression that it was going to be tied to a  
2 sharia-extremist-driven view of al-Shabaab, but you may  
3 correct and -- I'm not --

4 MR. DURKIN: I understand.

5 THE COURT: -- making a ruling here that there can  
6 be no mention of sharia --

7 MR. DURKIN: Right, not --

8 THE COURT: -- during the government's  
9 case-in-chief, but, once again, we're more in a line-drawing  
10 process.

11 MR. COLE: It's -- yeah, and it's an odd thing in a  
12 way to be talking about because al-Shabaab, what is it? It's  
13 an extreme Islamist organization, and so you can't talk about  
14 it without, to some extent, talking about extreme Islam.  
15 There's just no way to separate that entirely, so Ms.  
16 Moreno's right about that. But the point of bringing in  
17 those instances of violence is not to lead us down a rabbit  
18 hole on extensive discussions as to different types of Islam  
19 in the world; it's to talk about al-Shabaab and what it does  
20 and what it has done, and what it's famous for. That's the  
21 point of that evidence.

22 THE COURT: Okay.

23 MR. DRATEL: And, your Honor, I'd just say if the  
24 Court is -- there is a line over which you cross where it  
25 becomes a 403 problem.

1                   THE COURT: Okay. I am alerted. Thank you.

2                   MR. DRATEL: Good luck. Just stating the obvious.

3                   THE COURT: Well, okay. That takes care of the  
4 seventh motion in limine, basically deferring individual  
5 rulings and hopefully with the statements of counsel and the  
6 guidance of the Court here being able to head off future  
7 issues or at least being able to give some thought to these  
8 issues arising ahead of time.

9                   That raises the use of a questionnaire; there's a  
10 motion to utilize a jury questionnaire and for attorney voir  
11 dire, and I think we've reached that point in these  
12 proceedings and the motions where I can address that.  
13 Anything further on any of the matters we've been discussing  
14 up to this point?

15                   (No response)

16                   THE COURT: Okay. Now, with respect to a  
17 questionnaire, I know the government is opposing the use of a  
18 questionnaire and taking the position that this is, if not a  
19 routine case, something that falls within the general  
20 category of routine cases and there's no need to engage in  
21 any more of a jury selection process than we would typically  
22 have. I think it's beyond routine, and I think it is one of  
23 those cases where a jury questionnaire would be helpful.

24                   I've gone through the questionnaire you've looked  
25 at, Ms. Moreno. Let me say that I've come to this conclusion

1 with several reservations, and you need to know what they  
2 are; there are practical -- real, practical concerns, and  
3 there are logistical concerns and substantive concerns.

4           With respect to a questionnaire, I think if we're  
5 going to use one -- and I'm inclined to do so -- that you  
6 should know some of the following. First of all, we've sent  
7 out approximately 500 summonses for a time-qualified pool; we  
8 will have a time-qualified pool here. I don't know how many  
9 jurors will be here. My hope would be to ultimately yield 75  
10 to 100 prospective jurors after sending out 500 summonses.  
11 They're time-qualified for up to a month.

12           I'm getting a little bit ahead of myself right now,  
13 but any questions relating to hardship, for example -- and  
14 you had a couple of pages relative to hardship -- are out.  
15 Everybody would be claiming hardship, or nearly everyone, if  
16 in fact questions such as "Will this be inconvenient for  
17 you," "Would you rather not be on this jury" are posed to  
18 prospective jurors. So that portion of the proposed  
19 questionnaire is not going to be utilized.

20           MS. MORENO: Mr. Dratel wanted to know if that  
21 included the lawyers.

22           THE COURT: The original jury selection process, of  
23 necessity, that is, the first couple of days, will have to  
24 take place in another courtroom. Obviously we don't have the  
25 necessary seating for that, so what we're going to be doing

1 is using the courtroom just below us on the fourth floor,  
2 which is Courtroom 1, that's Judge Gonzalez's courtroom.  
3 That was the ceremonial courtroom up until the construction  
4 of the annex, the new courthouse, and so we'll be utilizing  
5 that; it has much more seating capacity, and I've used that  
6 courtroom before for similar purposes.

7           What would happen would be the people, the  
8 prospective jurors who are time-qualified and who appear,  
9 would be given some preliminary instructions -- obviously the  
10 nature of the case would be introduced to them, they'd be  
11 given some preliminary instructions -- and I'm speaking in  
12 very broad -- very broad-based strokes right now -- they  
13 would be given a questionnaire. It would be an anonymous  
14 questionnaire; in other words, it would not have their name  
15 on it because there's so much personal information that's  
16 being requested, so the questionnaires would be numbered.  
17 They would be -- and only the questionnaires would be  
18 numbered -- and then there would be a key to that process,  
19 and then they would fill out the questionnaires in the  
20 courtroom and then submit those, hopefully, still in the  
21 morning, and then we would have the original questionnaires.

22           Having gone through this process before, rather  
23 than tasking limited resources here in the courthouse, what  
24 would be necessary in my view would be for those  
25 questionnaires to be, in all probability, given to the

1 government so that the government could reproduce the  
2 requisite number of questionnaires. So for each  
3 questionnaire you're going to be creating, I don't know, five  
4 or six copies, perhaps a -- it may not be five or six, but a  
5 copy for the government, maybe two copies for the defense, a  
6 working copy for me, so at least four copies. And assuming  
7 that the questionnaire is somewhere between 10, 15 pages and  
8 you're talking about 75 to 100 people, you're talking about  
9 thousands of pages of photocopying. It's really a  
10 significant task, and I see no way around it.

11                   So hopefully that would be done while there's still  
12 time in the day, time in the afternoon for the Court and  
13 counsel to get together so that we could review the  
14 questionnaires and eliminate those individuals who are  
15 clearly inappropriate for serving -- potentially serving on  
16 the jury -- and I assume that we'd have a certain number of  
17 those -- and that ultimately we would yield -- we would  
18 reduce the pool to, once again, a workable number, and just  
19 picking 50 to 75 individuals, let us say. And then we'd  
20 probably, depending on how many people we have, go forward  
21 that second day with traditional voir dire where my part of  
22 it is going to be some hours, even though we have a  
23 questionnaire, but limited -- limited -- voir dire on the  
24 part of counsel.

25                   And this is the other part of it; these are some of

1 my practical concerns. You're already delving into areas  
2 here where you want to disqualify -- not disqualify but  
3 basically identify people you don't want on the jury, and I'm  
4 referring to you, Ms. Moreno. So that's essentially your  
5 purpose. Also it's a purpose of the government but more -- I  
6 think more appropriately a legitimate defense purpose. So  
7 there's no need to go into any protracted voir dire of  
8 individuals, you know, because of how they've answered a  
9 particular question; that's kind of beyond the beyond, you  
10 know, and they haven't been summarily let go for cause.  
11 There's no need for you to go into any kind of a protracted  
12 examination. Just key on -- just key on the people for whom  
13 you have problems or -- not problems but issues and real  
14 concerns, you just want additional information.

15 Part of the problem using a questionnaire is, in my  
16 view, it cuts down on the amount of voir dire by counsel  
17 because a lot of that's been handled, and my own experience  
18 has been -- and I don't know how true this is across the  
19 board -- but my experience has been and I know the experience  
20 of other judges has been that when you use a questionnaire  
21 where jurors, prospective jurors, don't hear the stories, the  
22 full stories of other individuals, don't go through this rite  
23 of passage together, they don't bond quite as well, and  
24 sometimes they don't deliberate quite as well as if they've  
25 gone through this whole process together. It's just a

1 personal observation on my part. It's idiosyncratic; it may  
2 have nothing to do with any kind of a trend or a general  
3 concern, but I think that the use of questionnaires has some  
4 limitations, and I've tried to identify what those  
5 limitations are for you, certainly practical, logistical  
6 concerns, but I also had the impression that as jurors are  
7 not sharing what they typically would in a routine case,  
8 hearing one another's story and being able to speak to one  
9 another about some of what they've heard on routine matters  
10 having nothing to do with the case, I question how well they  
11 come together as a cohesive group.

12 That being said, I'm inclined to use a  
13 questionnaire. There are certain -- if I use what you've  
14 proposed as a template here, then there's going to be a need  
15 for some substantial -- not substantial but some significant  
16 modifications and eliminations.

17 Mr. Cole, did you have any -- you've been sitting  
18 quietly here. I know the government is generally opposed to  
19 a questionnaire. I've already enlisted your office into  
20 engaging in an activity you're objecting to.

21 MR. COLE: That's okay. All we would ask is that  
22 -- our motion response was really directed at not having a  
23 questionnaire. We would just ask for a -- how are we going  
24 to settle on the actual questions to be used in the  
25 questionnaire? Because although we highlighted some of the

1 ones we found the most problematic in our response, but we  
2 would just want to know how that will play out, exactly what  
3 the questionnaire will ask, if the Court's going to prepare  
4 its draft, and that's one issue.

5                   The other issue is just for scheduling reasons,  
6 does the Court have an estimation of -- this is for  
7 scheduling, particularly our witness in Africa -- does the  
8 Court have an estimation of how long the entire jury  
9 selection process may likely take in this case so we know  
10 when we could anticipate bringing a witness? If we start on  
11 Monday, for example, and you have -- I think that Friday you  
12 said would normally be a calendar day for you -- and it would  
13 be great if it wasn't, but --

14                   THE COURT: Yes, unfortunately it is.

15                   MR. COLE: Okay. Then with that in mind, do you  
16 think that this would be no more than a two-day process  
17 getting the jury?

18                   THE COURT: No more than a two-day process is what  
19 I'm planning for, so I think counsel should plan for that as  
20 well. So, frankly, I'm looking at being ready to go with a  
21 reduced pool on the second day. My part of it will take  
22 between two to three hours; I think you'll see it's going to  
23 be fairly exhaustive even after the utilization of a  
24 questionnaire because there are some principles that I  
25 want -- and some cautionary instructions that I want these

1 prospective jurors to truly appreciate and not just read on  
2 paper and respond to on paper.

3 MR. COLE: Then how will the -- what does your  
4 Honor propose?

5 THE COURT: So my part -- I'm going to go first --  
6 it's going to be two to three hours. I'm going to -- we're  
7 going to go with a jury of 12 with two or three alternates.  
8 Each side will have the number of peremptories they typically  
9 have; it's going to be six for the government, ten for the  
10 defense to be shared, plus an additional peremptory challenge  
11 if there are two alternates, and if we're going to utilize  
12 three alternates, then each side will have an additional  
13 extra challenge. So under that scenario it's either going to  
14 be 7 and 11 or 8 and 12 total peremptory challenges to what  
15 will probably be either a 32-pack or a 34-pack. So you're  
16 going to have that jury list randomized numerically ahead of  
17 time, and so you're going to know who the first 32 or 35 will  
18 be based on the -- on the number of alternates we're going  
19 with and what the order of jurors will be after that, having  
20 been randomly placed in some order on the sheet. And then if  
21 we end up excusing people from the original pack, then we'll  
22 be bringing in other pool members, prospective jurors, to  
23 fill.

24 MR. COLE: Will the Court then be proposing its own  
25 questionnaire or should we assume that we'd argue over the

1 one that was submitted by --

2 THE COURT: Well --

3 MS. MORENO: If I may address that.

4 THE COURT: Ms. Moreno?

5 MS. MORENO: Thank you, your Honor. And I thank  
6 you on behalf of all the defendants that the Court is  
7 granting the questionnaire. Usually -- quite honestly, your  
8 Honor, in my experience, usually the defense and the  
9 government both collaborate on a questionnaire. This was not  
10 the case here unfortunately. I am happy to talk to Mr. Cole  
11 and to the government about those questions that they  
12 strongly object to. I will say to the Court, however, that  
13 all the questions that we have in the questionnaire that deal  
14 with obvious bias and prejudices about religion, about  
15 Somalia, about terrorism, now that we know, especially in  
16 light of your Honor's rulings that al-Qaeda is coming in to  
17 the case, the murders of the nun and the nurse, some aspects  
18 of Islam are coming into the case, that it makes it all the  
19 more relevant to -- just to know if a juror, just hearing --  
20 a prospective juror just hearing that that's going to be part  
21 of the case, can they still be fair. That's really -- that's  
22 the goal here. I appreciate the Court doing anonymous  
23 questionnaires because I believe it promotes candor, quite  
24 frankly, your Honor.

25 And finally, I'm happy to go through this

1 questionnaire with Mr. Cole and add questions or delete them  
2 and submit it to the Court within the next couple of days. I  
3 think we can do that very successfully. It's usually been my  
4 experience to do that.

5 So -- and with respect to the voir dire, the  
6 attorney voir dire, I agree with your Honor that it does cut  
7 down and that it focuses -- if the government and the defense  
8 can't agree on the cause challenges that I think often are  
9 obvious in the questionnaires; but if we can't agree, those  
10 seem to be the places where the lawyers spend the most time  
11 is to develop that cause record. So I agree with your Honor  
12 that the -- that really the questionnaire saves court time  
13 because we have a lot of information.

14 THE COURT: Okay. Thank you. I appreciate your  
15 comments. I know I would certainly welcome both sides  
16 meeting and conferring on a questionnaire. Ultimately either  
17 it will be jointly prepared and, you know, physically created  
18 by one side or the other, but I also had some concerns myself  
19 going through what was proposed. So what I'd like to do at  
20 this point is just take a few minutes and go through what  
21 was -- what was proffered by you, Ms. Moreno, on behalf of  
22 the defense community here and eliminate some of the  
23 questions and also giving you my reasons why I'm concerned  
24 about eliminating some of these references.

25 Perhaps importantly to you, I think those questions

1 relating to fundamental biases, prejudices, and the rest are  
2 questions that should remain. I think I agree with a good  
3 deal of what you said about the propriety of those questions,  
4 but let's get started. And if you can turn to your  
5 questionnaire. Mr. Cole, do you have yours in front of you?

6 MR. COLE: Yes, your Honor. Thank you.

7 THE COURT: Okay. You'll see that -- well,  
8 starting with the questions themselves, in terms of the  
9 introductory paragraph, I assume -- I assume that's  
10 appropriate. It's an admonition or an explanation I'd be  
11 giving anyway verbally to the pool. But all of the  
12 questions, as I say, under this hardship part would be out.  
13 So strike the whole hardship section on page 2 and going over  
14 onto page 6 through page -- page 2, question 6.

15 Then you start on page 3, description of the case.  
16 This is a criminal case, and I think jurors need to know  
17 that. This is a little too sanitized. I would -- if I were  
18 writing this, it would be "this is a criminal case" -- add  
19 the word "criminal" in front of "case" -- "in which the  
20 United States has charged four" -- strike "gentlemen" and put  
21 "individuals" down there -- "four individuals with providing  
22 material support, principally in the form of money, to a  
23 terrorist organization in Somalia, and of conspiracy to  
24 commit violence against persons in Somalia, a country in the  
25 horn of Africa." I would add that.

1                   Now, you poll, you know, average people on the  
2 street about Somalia and I dare say very few of them would be  
3 able to tell you it's even a country, and you get a smaller  
4 percentage being able to identify where it is. So I would,  
5 just for informational purposes add, "a country in the horn  
6 of Africa." Well, maybe strike "horn." I mean --

7                   MR. COLE: Your Honor, I was wondering if based on  
8 what you said earlier that you were going to bring them in,  
9 give them a description of the case before you --

10                  THE COURT: That's --

11                  MR. COLE: Can you strike the description out of  
12 this and let your Honor --

13                  THE COURT: That's fine too.

14                  MR. COLE: -- do it? I think you will have already  
15 read the -- told them the charges in the indictment.

16                  THE COURT: I will.

17                  MR. COLE: Okay.

18                  THE COURT: I will, yeah, which raises another  
19 issue; I'm glad you brought that up. I always ask the  
20 parties to prepare a joint nonargumentative statement of what  
21 the case is about, and, if you want, to include a theory of  
22 defense. I am going to read the indictment at some point,  
23 but if you want to give just a quick, you know, summary of  
24 the case and the nature of the charges and a theory of  
25 defense so that the jurors, prospective jurors, are generally

1       acquainted with what is before them -- and it's a criminal  
2       matter; it's not a civil matter, it's a criminal matter -- I  
3       think that would be helpful. I would just at that point  
4       eliminate this introductory statement; it's not necessary.  
5       But if you're going to utilize something describing the case,  
6       I'm telling you and suggesting to you what might be included  
7       in there.

8                   MS. MORENO: I appreciate that, your Honor.

9                   THE COURT: All right. And then continuing on,  
10        "They are charged in multiple counts," that's fine. "They  
11        each deny all allegations" -- put "each" in there -- "they  
12        each deny all allegations and are presumed to be innocent."  
13        Might as well add that at the very beginning. Okay.

14                  Continuing on, background information, 7, 8, and 9,  
15        no problem. I don't have any issue with general gender/age  
16        questions nor in what area of the district they live in;  
17        that's fine.

18                  Are you a registered voter and if what, what is  
19        your party affiliation? You can strike 11. I think that's  
20        unduly -- that's just intruding into private affairs and  
21        status; that would be out. However, I think it is  
22        appropriate to ask them if they identify politically with  
23        certain groups. So you have Christian fundamentalists,  
24        traditional conservatives, libertarians, moderates, liberals.  
25        But in my view you've left off two of the most important

1 categories: Independents -- because most people identify  
2 themselves as independents today -- and none of the above.

3 MS. MORENO: By the way, your Honor, I'm  
4 incorporating all the Court's comments; I will have it in  
5 Word and send it to the government as well.

6 THE COURT: Well, I'd like it to be compatible  
7 with -- you know, if you want to send us a disk, ultimately  
8 we can print out our own copies, but just make sure it's  
9 compatible with what we have, okay?

10 MS. MORENO: Thank you.

11 THE COURT: All right. Thanks. Okay. The rest of  
12 page 4 seems to be appropriate. Just a general reaction to  
13 what's here. I mean if you all agree on something along  
14 these lines on status, that's a little different, fine, but  
15 I'm just saying what's here is generally fine; I don't see  
16 any issues here. Mr. Cole, I'm going to give you a chance to  
17 register any additional concerns after I go through this the  
18 first time.

19 Then the next page, I guess it would be page 5, no,  
20 I don't see any issues there; I mean I think it's all  
21 pertinent. Military experience basically or close to people  
22 with recent military experience. Residence in the horn of  
23 Africa.

24 MS. MORENO: Do you want me to strike "horn of,"  
25 your Honor?

1                   THE COURT: No, I think once we identify it or  
2 explain it -- you know, I don't think a large percentage of  
3 people would admit to knowing what the horn of Africa is or  
4 where it is. I know -- you know, they've probably heard the  
5 term, but they probably couldn't locate it, you know.

6                   MS. FONTIER: Let's assume though that the answer  
7 is yes, they would though if they can find it on the map.

8                   THE COURT: We don't want them looking at maps.  
9 No, let's not encourage them to go to alternative sources of  
10 information on the case. Okay. So page 5 looks okay.

11                  Page 6 I didn't have any issues with, you know,  
12 asking for general experience and to law enforcement, family  
13 or close friends in law enforcement, pretty standard.

14                  Personal beliefs, down there at the bottom, I  
15 would -- under page 25 -- excuse me -- question 25 -- I  
16 would -- this is important; this is going to be relevant for  
17 other questions as well -- I think you need to put "if any,"  
18 the words "if any." "What is your view, if any, of the  
19 Muslim or Islamic faith?" Most people probably don't have a  
20 view of it or, if they have a view, it's just not more than a  
21 very generalized view that it's one of the basic faiths of  
22 the world. Mr. Cole?

23                  MR. COLE: I wanted to dwell on question 24 for a  
24 minute; I think it's a real problematic question. I think  
25 it's too broad. I don't know how someone with -- would even

1 in truth actually answer that question without going back to  
2 every -- well, one, it goes back to being a member of a  
3 political party as well, and every social, political,  
4 religious, recreational organization? That list could go on  
5 and on and on. You'd have jurors sitting here wondering if  
6 they're truthfully going to answer that question. And it's  
7 also very personal.

8 THE COURT: I looked at that. I think it is broad.  
9 I would tend to -- I would tend to knock that down into any  
10 organizations that they're active in at the present time.  
11 They're already being asked if they identify politically with  
12 religious -- any religious -- see how that question went --  
13 they're being asked if they politically identify with groups,  
14 including Christian fundamentalists; that's the only earlier  
15 reference to religion. I would agree that this should be  
16 limited to current organizations. Strike "religious  
17 organizations."

18 MS. MORENO: Your Honor, if I may?

19 THE COURT: Yes.

20 MS. MORENO: I'd rather strike the others before I  
21 strike the "religious organizations" given the --

22 THE COURT: But we're going to get into --

23 MS. MORENO: Okay.

24 THE COURT: -- other questions relating to any  
25 religious beliefs --

1 MS. MORENO: Okay.

2 THE COURT: -- or affiliations that would in any  
3 way affect their ability to fairly judge the evidence in this  
4 case and to render a fair and impartial verdict; we're going  
5 to get to those questions. But asking people to identify  
6 their religion, you know, on this kind of a questionnaire, I  
7 would tend to agree with Mr. Cole.

8 MS. MORENO: So would the Court then like number 24  
9 to read "what current organizations"?

10 THE COURT: I think that's -- I think that's --

11 MR. COLE: I think that would -- I'm sorry.

12 THE COURT: Go ahead.

13 MR. COLE: That's a much better question, although  
14 I would say that since we're going to get into viewpoints  
15 quite extensively in the question if they have a view about  
16 this subject or about that subject, I'm not sure why this  
17 question is even really needed. If the point is to get out  
18 someone who might be prejudiced against or biased against the  
19 defense, the extensive questions about all those possible  
20 grounds and biases seem more pointed than just generally what  
21 like are you maybe a member of the Little League, Little  
22 League board, a homeowners association --

23 THE COURT: It puts a little flesh on the bones.  
24 Once again, we keep getting back to the same -- to the same  
25 issue; you've had the issue, the defense has had the issue.

1 How far can you go in defining al-Shabaab? How much context  
2 is appropriate? You want the jury to get a feel for the  
3 organization. You know, the defense wants the jury to get a  
4 feel for the individual defendants and -- through their own  
5 personal history and context and all so they can better --  
6 perhaps better understand what was done in this case. And  
7 everyone wants to get a little bit of a better feel about  
8 jurors. I'm not one to allow questions about what are your  
9 favorite television programs, what's the last book you read,  
10 what bumper stickers do you have on your car, if any; but I  
11 think organizational associations, as long as they don't  
12 unduly intrude into religious or political affiliation or  
13 registration, are appropriate, especially when we're going to  
14 be asking some questions dealing with religious beliefs in  
15 other contexts. So you can limit it -- you can limit it to  
16 current -- membership in current organizations but  
17 striking --

18 MS. MORENO: The descriptions.

19 THE COURT: Well, I'd strike political -- well,  
20 political organizations, excluding party affiliation.

21 MS. MORENO: Your Honor, I'm --

22 THE COURT: Yes.

23 MS. MORENO: -- confused.

24 THE COURT: Strike "political."

25 MS. MORENO: Yes.

1                   THE COURT: Strike "religious," leave the others.

2                   MS. MORENO: Okay.

3                   THE COURT: Okay? That gives you some -- it puts  
4 some flesh on the bones and I think eliminates the concern  
5 that I have. So just strike those two.

6                   MS. MORENO: "Political" and "religious."

7                   THE COURT: Yeah.

8                   MS. MORENO: Thank you.

9                   THE COURT: Okay. Is there anything else you  
10 wanted to mention, Mr. Cole?

11                  MR. COLE: No, your Honor. That was my question.

12                  THE COURT: So then on question 25 we're adding the  
13 words "if any," not requiring them to -- it's not a test. I  
14 don't want it to sound as if they're taking a test, you know.

15                  MS. MORENO: It's a test on fairness; that's how  
16 the defense sees it. Your Honor, would you like it "What is  
17 your view, if any, of the Muslim" --

18                  THE COURT: That's fine, yeah.

19                  MS. MORENO: Thank you.

20                  THE COURT: Okay. And then along the same lines,  
21 page 7, question 26, question 26, page 7, I would add the  
22 words "that you are aware of" after "doctrine."

23                  MS. MORENO: Okay.

24                  THE COURT: "Is there anything about Islamic  
25 teaching or doctrine that you are aware of that is personally

1       offensive to you?" This gets away from imposing a test  
2       question, and if they're not aware of any specific teachings  
3       or doctrine, then they can so state. Did you have any  
4       concern about that, Mr. Cole?

5            MR. COLE: Well, I guess not, your Honor. I mean I  
6       think it's -- I don't think it's a particularly useful  
7       question because they've just been talking up till now about  
8       how they don't want this case to be about Islamic teachings.

9            THE COURT: It should be in another area of  
10       questioning. Make you can work on that. I think the  
11       question itself is okay, but maybe you move it to another  
12       area. Or if it's covered by another question or other  
13       questions, then maybe you don't need it. But if you're going  
14       to ask it, all I'm suggesting is that you impose or you put  
15       the qualifier in there "that you are aware of."

16           MS. MORENO: Okay.

17           THE COURT: Okay. Question 28, I would add "if  
18       any" again. It reads now, "What is your opinion of people of  
19       Somali descent?" I would add "if any" either in the middle  
20       of the sentence or at the end.

21           MS. MORENO: Yes.

22           THE COURT: Question 29, I would add "if any" after  
23       the word "contact."

24           MS. MORENO: Yes.

25           THE COURT: Okay. Page 8, question 33, strike

1 "gentlemen," strike "charged"; put "defendants" there.

2 "Defendants in this case are from Somalia and are Muslim."

3 MS. MORENO: Yes.

4 THE COURT: Page 9, strike 37 and 38. In terms of  
5 news sources, you know, what are their primary sources of  
6 local news and national news, that's all fine, and even  
7 subscribing to newspapers, magazines, fine.

8 MS. MORENO: Just 37 and 38?

9 THE COURT: Just 37 and 38 because that just gets  
10 into irrelevant areas and takes up a lot of time --

11 MS. MORENO: I understand.

12 THE COURT: -- if anyone -- and I would make the  
13 same suggestion with respect to voir dire, once the attorneys  
14 are engaged in voir dire, what stories are of interest to  
15 you, what are your hobbies. So 37 and 38 are out.

16 Then we begin with knowledge of the trial  
17 participants in the case, and this is where I have a little  
18 bit of a question here. The introductory paragraph, "Because  
19 of the publicity surrounding this case, some jurors may have  
20 heard and/or read something about the case at some point."  
21 Nothing wrong, et cetera, with having heard. And then  
22 question 40, "The case for which you were summoned involves,"  
23 well, that's a little too generic, "involves." I mean, first  
24 of all, I don't even think that's necessary. They're already  
25 going to be advised that this case is a case brought against

1 these individuals, these defendants, so the case does more  
2 than involve them, and so I don't think 40 is necessary as a  
3 lead-in.

4                   And then with respect to -- with respect to  
5 publicity, you know, Ms. Moreno, I read through your papers  
6 here, and you spent quite a bit of time tracking what your  
7 research had turned up on this case. I've seen some -- let  
8 me tell you what my exposure has been to this case vis-a-vis  
9 public reporting of it. And, admittedly, I haven't done an  
10 Internet search of my own, but anytime there's a case  
11 involving a case assigned of one our judges, we are informed  
12 of it, that is, a case in the newspaper -- not on television,  
13 but in local newspapers; we have somebody who actually does  
14 that because we need to be aware in publicity cases of what  
15 is being published so if we need to address that with the  
16 jury during a case ongoing, we can do that. I'm only aware  
17 of a couple of newspaper articles that have been published  
18 locally on this case.

19                   Now, in your papers you indicate that you've gone  
20 on the Internet, you've Googled the case, and you see  
21 hundreds of links or -- well, and thousands of related to one  
22 of the defendants, the lead defendant. But that may just  
23 be -- those links may just be outlets, media outlets,  
24 individual newspapers picking up the exact same story and  
25 reprinting it. I don't really -- you seem to feel this case

1 has gotten a lot more publicity than I've been exposed to.

2 MS. MORENO: Well, certainly from a defense  
3 perspective we would like no publicity at all, and these  
4 cases always have publicity though. I don't -- I don't know  
5 personally the reporters, but every time we've been in the  
6 courtroom, reporters have been in the courtroom.

7 The Internet broadens everyone's world, your Honor,  
8 and that's why I put it in the papers because what we know  
9 for sure is that jurors get on their computers and they  
10 Google the stories. And we know that there has been some  
11 local television press about this case. It hasn't reached  
12 the level that we see some of the publicity that attends some  
13 of these other cases which actually I've been involved in,  
14 no, but from my point of view, I'd rather have no publicity  
15 about my client, have a juror not heard or seen anything. I  
16 don't think -- I think that you have to ask -- and whatever  
17 way the Court wishes to do that, if you're going to that in  
18 your general voir dire --

19 THE COURT: I do that.

20 MS. MORENO: -- I'm happy to not even speak any  
21 more about this, your Honor --

22 THE COURT: Well --

23 MS. MORENO: -- but I think you have to do it.

24 THE COURT: -- what I've done previously in the  
25 context of a questionnaire and what I always do in any kind

1 of a case that has any kind of a profile to it is I mention  
2 it in a softer way than what you have here: "Because of the  
3 publicity surrounding this case" -- I mean all of a sudden  
4 that creates images and all kinds of musings on the part of  
5 prospective jurors or jurors that may not be appropriate; it  
6 may be too much.

7 I would -- I've always taken the position look,  
8 because of the nature of the case, there may be some coverage  
9 of it, there may be some publicity about it, there may have  
10 already been publicity about it to which you might have been  
11 exposed. I just use that as an entrée into the more  
12 important admonition, and that is telling them that during  
13 the course of the trial, they cannot access not only any  
14 stories about the case, any stories about the subject matter  
15 of the trial, they can't access any -- that they can't listen  
16 to any television or news accounts, they can't go on the  
17 Internet, they can't perform their own -- I mean I cover all  
18 of that. But in terms of introducing the subject, I don't  
19 like to raise the flag in such a stentorian way and then try  
20 to lower it. I try to just suggest that there might be some  
21 publicity about the case, it may be reported, and how  
22 important it is for them to avoid all of that.

23 MS. MORENO: I have a suggestion, your Honor. I  
24 would be happy to reword that introductory paragraph to not  
25 say anything about publicity and just ask the jurors if

1 they've heard anything about this case and these gentlemen  
2 because the following questions then ask "and if you have  
3 heard" -- I don't care where you heard it from, but if you  
4 have heard -- "about it, what's your reaction?"

5 THE COURT: That's fine. That's better.

6 MS. MORENO: And basically --

7 MR. COLE: Just go to question 40; just go straight  
8 to question 40.

9 THE COURT: Well, yeah.

10 MS. MORENO: We are on question -- correct.

11 THE COURT: Strike (a) and it becomes question 40.  
12 What -- well, have you -- you can do that; you can work on  
13 the language of that. But there's no need for the  
14 introductory paragraph; it raises the flag I think  
15 unnecessarily, but we can just move into the area in a more  
16 nuanced way so that if they remember that they've seen  
17 something about this case --

18 MS. MORENO: Okay.

19 THE COURT: And, you know, they may well be  
20 confusing this case with other articles they've read or heard  
21 about Somalia, other activities or -- those of us who follow  
22 the news pretty carefully are pretty familiar with what's  
23 been going on in Somalia, and certainly we knew that because  
24 of the current status of Somalia, you couldn't even take  
25 depositions there. So I think there's been general sporadic

1 reporting on Somalia, the question of how secure it is and  
2 the related subjects. So make it as generic as you can, but  
3 also include in this -- somewhere in this questionnaire  
4 publicity for the larger issue, Somalia and what the problems  
5 in Somalia, current state of affairs. Things may be --  
6 things may be improving there. I know Ms. Fontier is a  
7 regular visitor; perhaps --

8 MS. FONTIER: Beaches, I love 'em --

9 THE COURT: Well, okay. So I think you get the  
10 gist. Go through pages 9 and 10 and make the necessary  
11 corrections there. Page 11 I didn't have any questions with  
12 except when you get down to --

13 MS. MORENO: Forty-seven?

14 THE COURT: -- 47, yeah. And see, this is what --  
15 I've already interlineated it. I've changed the first  
16 sentence from "This case is likely to receive ongoing media  
17 attention" to "This case may receive some media attention."  
18 And you could -- I think the rest of it is okay.

19 MS. MORENO: Okay.

20 THE COURT: If you want to come up with something  
21 better working with Mr. Cole, you certainly are able to do  
22 that. Page 12, prior jury service; once again, I get into  
23 this pretty carefully myself, and it is intruding into  
24 areas -- I mean this questionnaires gets into so many areas I  
25 would typically cover, but that's okay. I would strike the

1 question as to whether they were the foreperson. It's not a  
2 separate question, but that part of 48 asking whether they  
3 were the foreperson.

4 MS. MORENO: Okay.

5 THE COURT: Next, page 13, feelings about the  
6 criminal justice system, 55; you can eliminate that.

7 MS. MORENO: But they come up with such great  
8 answers, your Honor.

9 THE COURT: I know. That's what I'm concerned  
10 about.

11 MR. COLE: Your Honor, if we can back up just for a  
12 second. On 49, question 49, what does that -- that seems  
13 sort of far afield. Seems to me we're getting beyond issues  
14 relevant to this particular case. This case isn't involving  
15 efforts to change the law in any way, it's not talking about  
16 the legislative process, and we already have had a lot of  
17 questions in this questionnaire about leanings politically or  
18 views on Islam.

19 THE COURT: I don't think it's particularly  
20 germane.

21 MS. MORENO: I'm happy to withdraw it, your Honor.

22 THE COURT: Then with respect to opinions on the  
23 trial is where I have quite a few changes. Questions 56 and  
24 57 I get into very thoroughly, and what I want to do is I  
25 want to instruct them, I want to instruct them before these

1 questions are asked.

2 MS. MORENO: Well, if I may -- if I may engage the  
3 Court on that issue. I can appreciate that, but what  
4 we're -- what we're trying to find out is how they really  
5 believe before any instructions are given. Now, the Court  
6 can instruct afterwards, I have no problem with that, but  
7 this is a test of what prejudices and opinions do they  
8 harbor. And honestly, your Honor, even though jurors will  
9 often say to the Court yes, I can put the fact that I have  
10 negative feelings about Muslims because of 9/11, they can't  
11 because that aside place doesn't really exist; although they  
12 will tell the Court yes, I can put it aside, we know that's  
13 almost unnatural, that that's really -- that really doesn't  
14 happen. These questions are designed before the Court starts  
15 instructing them about how they really feel about these  
16 matters that are central in this particular case --

17 THE COURT: Well --

18 MS. MORENO: -- so I would fight for those two  
19 questions, your Honor, because what we see in questionnaires  
20 is jurors, even though they understand of course the Fifth  
21 Amendment, they have big problems with defendants not  
22 testifying --

23 THE COURT: I'm aware of that, and that's why --

24 MS. MORENO: -- and I'm not --

25 THE COURT: -- I spend so much time on it, and even

1 after I spend time on it, there are those who say you know, I  
2 just -- I just, I have trouble with the defendant not taking  
3 the stand or I can't say I wouldn't hold it against them if  
4 I -- if a defendant didn't take the stand and tell his side  
5 of, I just don't know how I feel about it. They're gone.  
6 But rather than having to rehabilitate an entire group or a  
7 majority of a group because most people "no, I would want to  
8 hear the story," I want a shot at it.

9 It's been my view that based on my approach that I  
10 encourage them after it's driven home how important these  
11 bedrock principles are, that they, if they have a doubt, to  
12 express that doubt. And it's been my experience that that's  
13 the best way to handle it. And beyond that, you're certainly  
14 not precluded from following up if you have questions  
15 yourself with respect to any individuals given how those  
16 individuals may have responded to the questions I had for  
17 them after I instructed them. So, Mr. Cole?

18 MR. COLE: With that with -- I think I understand  
19 the ruling then on 56 and 57. But backing up to 54, we  
20 wouldn't ask unless I missed something.

21 THE COURT: I'm sorry?

22 MR. COLE: Question 54, says "Have you or anyone  
23 close to you ever been falsely accused of a crime?" That's a  
24 loaded question. I don't know why it's phrased that way. It  
25 ought to just say accused of a crime. That's implying that

1 there's an issue in this case about someone being falsely  
2 accused, and there is an issue about -- there's an accusation  
3 and there's a presumption of innocence, but there's no --  
4 there's no -- there shouldn't be a loaded question up front  
5 raising the issues of false accusations.

6 THE COURT: Okay. I'm going to leave it in. I  
7 think it's okay to ask.

8 MS. MORENO: Your Honor, what is exactly the  
9 Court's ruling on --

10 THE COURT: Yeah, I'm going to -- 56 and 57 should  
11 be out; I'll handle those. Fifty-eight, are there informants  
12 in the case?

13 MR. COLE: There's -- well, there's a  
14 cooperating -- a cooperating witness -- I don't know if he's  
15 an informant or not, but he's a cooperating defendant.

16 THE COURT: Okay. Well, does 58 even apply, Mr.  
17 Cole, based on your knowledge of what -- I mean are we going  
18 to need the special instruction on credibility that deals  
19 with informants, CIs, cooperating --

20 MR. COLE: Yes, we're going to have a -- we will  
21 likely have testimony from a witness who's receiving  
22 benefits; but that being said, we're not sure why it's  
23 couched in the framework of a case involving allegations of  
24 terror. It should be -- it should just be the normal  
25 question about that.

1                   THE COURT: Yeah, this is another area where you're  
2 kind of mixing and matching here. I get into -- another area  
3 I feel very strongly about in voir dire and cover very  
4 thoroughly is credibility of witnesses and the importance of  
5 not elevating the testimony of someone in law enforcement or  
6 affiliated with the government over non law enforcement  
7 personnel, that they must be -- credibility must be judged by  
8 the same criteria, the same standards. And this is an area  
9 that I get into carefully. And I would think we could  
10 eliminate 58. I have 58 (a) and all of 59 is areas that I  
11 cover.

12                   In addition to that, even if you were going to  
13 proceed with these, the question "What would be important to  
14 you in considering that testimony" is a -- with respect, an  
15 awkward way of asking that, but that gets to another area; it  
16 gets to an area of voir dire that I'm always concerned about,  
17 that is, an attorney, you know, flipping out a piece of  
18 evidence "how do you feel about that?" or "will that cause  
19 you to" --

20                   MS. MORENO: I'm sorry, your Honor.

21                   THE COURT: -- "be inclined" --

22                   MS. MORENO: I'm confused.

23                   THE COURT: Well, sometimes in voir dire -- look,  
24 the ultimate -- if you need to diffuse something, a negative,  
25 if there's a bit of evidence you want to bring up and just

1 diffuse within the context of voir dire, in my view, the  
2 appropriate way to do that is mention it, then ask the juror,  
3 prospective juror, if he or she can fairly consider that  
4 evidence in connection with all the other evidence in the  
5 case; that's the way to handle it. But to ask -- I know this  
6 question doesn't really get to that; you're talking more  
7 about credibility here, but to -- but it's closely associated  
8 with it, and I wanted to make sure I didn't forget it. To  
9 ask a juror how they feel about a particular piece of  
10 evidence or how they feel about the -- what weight they would  
11 give to the testimony of an informant is asking them to  
12 prejudge the evidence.

13 MS. MORENO: Well, your Honor, what I'm getting at  
14 here -- and these are pretty -- and I agree with the Court  
15 about 58 (a), what would be important, in one sense. But  
16 really, if a panel member believes that an FBI special agent  
17 who's on the stand, he's entitled, because of his status as a  
18 special agent, to more credibility, that he probably knows  
19 what he's talking about, all those things that people assume,  
20 that juror can't serve, and the way we're going to find that  
21 out is by asking these questions.

22 THE COURT: Well, first of all, I don't necessarily  
23 agree with your statement because your statement was very  
24 broad. You need to define "status" because there are an  
25 awful lot of things that go into status, including

1 experience, including expertise, training, skill. And that's  
2 why I say you can't really get into this area other than to  
3 drive home the point how important it is to judge all people,  
4 to judge all witnesses -- law enforcement/non law  
5 enforcement, expert witnesses/nonexpert witnesses, people  
6 affiliated with one side of the case or the other side or not  
7 affiliated at all -- by the same standards. They can weight  
8 those standards differently, but they -- what they cannot do  
9 is just assume that a law enforcement agent, an FBI agent, is  
10 inherently more truthful than someone that is not in the FBI.

11 MS. MORENO: I'm happy to --

12 THE COURT: And that's the way -- that's the way I  
13 handle it, and I've handled it that way for many years. It's  
14 important the way you ask these questions --

15 MS. MORENO: I agree, your Honor.

16 THE COURT: -- and "status," the way you point to  
17 status may, to the extent it includes a great number of  
18 things I already talked about, may well be considered by the  
19 jury as they're -- as they're assessing the credibility of  
20 witnesses. They will be looking at the level of education  
21 and expertise and the manner in which that witness has  
22 testified and all the --

23 MS. MORENO: I don't disagree with the Court at  
24 all. All I'm asking the Court to consider with respect to  
25 these couple of questions is that what we're looking for are

1 the candid answers of jurors, preliminary opinions before  
2 they hear the law because notwithstanding the compelling,  
3 perhaps opinion-changing effect that his Honor will have on a  
4 juror to dismiss a prejudicial opinion, in my experience it  
5 rarely happens. So I'm entitled on behalf of Mr. Mohamud to  
6 know if there are panel members who feel that just because  
7 someone is an FBI agent and that alone, without knowing  
8 anything else, that that person is probably far more  
9 reliable.

10 THE COURT: I think 59 is worded okay.

11 MS. MORENO: Okay.

12 THE COURT: And I think -- I think the question  
13 before that, although it's unnumbered -- I guess it's 58  
14 (a) --

15 MS. MORENO: Yes, your Honor.

16 THE COURT: -- the Court will instruct you on  
17 whatever weight you choose -- you choose? -- to the testimony  
18 of an informant, what would be important to you considering  
19 that testimony? That should be stricken; that's -- I don't  
20 think that adds anything, and, quite frankly, I don't really  
21 understand it.

22 MS. MORENO: Yes, your Honor.

23 THE COURT: But 58 --

24 MS. MORENO: Your Honor, usually this kind of a  
25 question is asked from the government's side.

1                   MR. COLE: Yes, but it's not how you feel. The  
2 question ought to be Do you have a view about the use of  
3 informants that would make you unable to serve as a fair and  
4 impartial juror.

5                   MS. MORENO: I'm fine with that.

6                   THE COURT: Okay. Why don't you change it if you  
7 agree as to that. My question on 58 was one I already asked,  
8 whether there were going to be informants, which I think you  
9 answered a few minutes ago. Okay. Question 60 -- so 59 is  
10 okay. Question 60 -- I know we're getting toward the end  
11 here -- I have it "as modified." "There may be evidence in  
12 this case consisting of telephone conversations tape recorded  
13 through the use of electronic devices" where I -- what I did  
14 was I struck "How do you feel about the use of recorded  
15 conversations" -- and, once again, getting back to an earlier  
16 suggestion -- "can you fairly consider that evidence along  
17 with all the other evidence in the case?"

18                   MR. COLE: That's fine, your Honor.

19                   THE COURT: Okay.

20                   MS. MORENO: Yes, your Honor.

21                   THE COURT: Okay. Then on to page 15, just  
22 striking the last question.

23                   MS. MORENO: Yes.

24                   THE COURT: Okay.

25                   MS. MORENO: I'm so sorry, your Honor. Which one

1 are you --

2 THE COURT: Sixty-one -- 65, I'm sorry, on page 15.

3 MS. MORENO: Striking --

4 THE COURT: Striking 65.

5 MS. MORENO: Okay.

6 THE COURT: And you can strike the oath there at  
7 the end. They'll be advised that they're -- orally that  
8 they're answering the -- they're giving these -- and they'll  
9 answer these questionnaires after they've taken the oath.  
10 They'll be advised that they're responding to these  
11 questionnaires as if they're under oath.

12 MS. MORENO: Okay. So strike the whole juror oath  
13 at the end?

14 THE COURT: Yes, at the end there.

15 MS. MORENO: Thank you.

16 THE COURT: Those were the suggestions I had and a  
17 few limitations.

18 MS. MORENO: And, your Honor, I'll have those  
19 revisions --

20 THE COURT: Just work with Mr. Cole on it. If you  
21 can get it back to me as quickly as you can and we can get  
22 that settled, I'm sure.

23 MR. COLE: Your Honor, we couldn't tell, did you --  
24 was 61 in or out?

25 THE COURT: Fifty-one?

1 MR. COLE: Sixty-one.

2 THE COURT: Sixty-one is --

3 MS. MORENO: In.

4 THE COURT: -- in I think but modified. Yeah, 61,  
5 I don't -- I haven't -- I don't have -- I don't have an issue  
6 with that. If you have an objection to it -- I know it's --  
7 it may be somewhat inartful. It's not a complete explication  
8 of the reasonable doubt instruction, but it raises the  
9 general subject of reasonable doubt and essentially asking  
10 them where the defendants are Muslim men or Somali, can you  
11 still apply that standard. Another way of saying can you be  
12 fair.

13 MR. COLE: It just seems that by this point in the  
14 questionnaire, these jurors have been asked now six ways to  
15 Sunday about their views of Muslims and Somalis, and it just  
16 seems to be overemphasizing those elements over and over and  
17 over again, but that's our only problem with the question.  
18 Not trying to get the subject of will they follow the  
19 standard, proof beyond a reasonable doubt. I don't know why  
20 it needs to be repeatedly emphasized. They've already been  
21 asked a whole series of questions about their views of  
22 Somalis and Muslims.

23 THE COURT: I understand that. I don't have any  
24 strong -- I don't have any objection to that, either to the  
25 wording of it or to its placement in the questionnaire. And

1 I will tell you, Mr. Cole, that I consistently remind jurors  
2 of the presumption of innocence from the beginning to the  
3 very end in jury selection because so many of the other  
4 instructions I will give them as to the constitutional right  
5 not to testify, to not put on a case, to the presumption  
6 of -- to reasonable doubt all read on or follow the  
7 presumption of innocence; so they hear that so many times --  
8 especially in a case like this, I think it's so important to  
9 keep reminding them of that -- that even though it may have  
10 been asked in different ways, six ways to Sunday, as you put  
11 it, in the questionnaire, I don't have any objection to it.

12 MR. COLE: Okay. Then I think that the only thing  
13 we wanted to say is there are probably just a few questions  
14 that we would want to add that -- about our side of the case.

15 THE COURT: Sure.

16 MR. COLE: And so we can -- when Ms. Moreno  
17 prepares her draft, we can consult with her on the few  
18 questions we want to add --

19 THE COURT: Absolutely.

20 MR. COLE: And then we'll submit them to your  
21 Honor.

22 THE COURT: Okay. Ms. Moreno?

23 MS. MORENO: Yes, your Honor.

24 THE COURT: As I went through your papers on  
25 this -- on this issue -- if you'd turn to page 6 of your

1 joint defense motion for jury questionnaire and attorney  
2 conducted voir dire, there's a reference to Mr. Wrangel.

3 MS. MORENO: This was a mistake, your Honor. This  
4 was Ms. Moreno cutting and pasting from all her  
5 questionnaires and motions that she had.

6 THE COURT: Okay. Thank you. I thought maybe I  
7 had missed someone in this case. Okay. And  
8 attorney-conducted voir dire will be -- will be permitted.  
9 I'm going to ask something in that regard. I always ask  
10 counsel in all cases to indicate what their proposed voir  
11 dire is, by them, by themselves, so that if there are any  
12 issues or any additional problems, that we address those up  
13 front. And so no later than the 18th, next Friday, I'd like  
14 attorney -- proposed attorney voir dire, that is, questions  
15 you'll be asking. They may not have been included in here --  
16 I mean I would hope they would have been included in here,  
17 general areas, but if there are any additional questions or  
18 areas of questions, please put those in written form and get  
19 those to me; file and serve them. And then if there are any  
20 additional issues, we can discuss those.

21 MS. FONTIER: Your Honor, so I'm clear, you're not  
22 asking for a complete list of specific questions; it would  
23 just be topics, and if we have specific questions, then to  
24 propose though as well? Or do you want an actual written-out  
25 list of questions?

1                   THE COURT: Pretty close to be written out, I mean,  
2 you know, topics and then any subtopics okay, but I just want  
3 to be able to foreclose inappropriate inquiry or objections I  
4 would have. I don't want -- I don't necessarily appreciate  
5 one side objecting to the voir dire of another side -- that's  
6 not the way you want to get off -- so that if there are going  
7 to be issues, then we can address them ahead of time before  
8 we ever get to that point.

9                   MS. MORENO: Your Honor -- and so given the Court's  
10 ruling on the -- on the issues of al-Qaeda and some of the  
11 other aspects of the case that we now know may be coming into  
12 evidence and was not included in the questionnaire, so for  
13 instance, that particular subject matter.

14                   THE COURT: What you're going to be asking, yes,  
15 what you'll -- the questions you'll be asking the proposed --  
16 the jurors.

17                   MS. MORENO: Okay.

18                   THE COURT: Yes.

19                   MS. MORENO: Thank you.

20                   MR. DRATEL: Your Honor, would we need to  
21 include -- I mean I guess it's almost self-evident; I just  
22 want to be clear about that. You're not asking us to, again,  
23 list the stuff from the questionnaire because it's a direct  
24 follow-up to that I assume's sort of covered in terms of you  
25 want other topics that are not necessarily direct follow-ups

1 to questions in the questionnaire.

2 THE COURT: Yeah.

3 MR. DRATEL: Okay.

4 THE COURT: Yeah, pretty much. Just put it in  
5 pleading form, get it to me by the 18th so that I can address  
6 it at some other point in time.

7 MR. DRATEL: Okay.

8 THE COURT: Anything else on voir dire? Look,  
9 we're going to go the first day just on the questionnaires  
10 because you've requested them and your request has been  
11 granted. That burns an entire day. And hopefully -- well,  
12 of necessity it limits what happens on the second day. My  
13 part of this is going to be about two to three hours, I told  
14 you, even after all of this comes in, so I'm going to limit  
15 the sides to attorney-conducted voir dire; I think that you  
16 can do what you need to do in an hour or less per side.  
17 That's all the time we're going to have that second day, so  
18 that's all the time I can provide to you. And then on the  
19 third day we're going to start with the opening statements  
20 and the case itself. But just adding up the time, that's  
21 what you're looking at in terms of voir dire. Anything else  
22 on voir dire? Anything else on any of the subjects we've  
23 talked about? Trial briefs. I do have a few others things I  
24 wanted to discuss with you. Mr. Durkin?

25 MR. DURKIN: Judge, can we just revisit the issue

1 of peremptory challenges just to put it on the record?

2 THE COURT: Yes.

3 MR. DURKIN: I'd like to make a request --

4 THE COURT: Can you use the lectern? Thank you.

5 MR. DURKIN: In light of the fact that there's four  
6 of us and you've already ruled that it's not your ordinary  
7 case -- I certainly don't think it is -- I would ask for  
8 additional peremptory challenges for each side.

9 THE COURT: What would your request be?

10 MS. MORENO: I would ask for, on behalf of  
11 Mr. Mohamud, one additional strike.

12 MR. DURKIN: I was thinking maybe 14 and 8, if we  
13 could each have one additional.

14 THE COURT: Mr. Cole?

15 MR. COLE: Well, we'll defer to the Court on what's  
16 appropriate. I think we'd prefer to stick with 10 and 6.  
17 There's going to be a lot of jurors coming through and with  
18 this extensive questionnaire, this focuses the inquiry and  
19 should make our strikes more useful than they normally would  
20 be, so we shouldn't need more strikes with all this  
21 additional information about the jurors.

22 MR. DURKIN: Well, I don't want to trade the  
23 questionnaire.

24 THE COURT: Pardon?

25 MR. DURKIN: I said I don't want to trade off on

1 the questionnaire, so I'll defer to you. I think the rule  
2 provides for it, and I think it's reasonable. I'll defer to  
3 the Court, but --

4 THE COURT: Well, it would be seven -- it would be  
5 7 and 11, 6 and 10, 7 and 11 with two alternates. Well, I  
6 don't know if we're even going to do two alternates. I'll do  
7 this: I'll give the defense two -- it'll be 8 and 12. Eight  
8 and 12 maintains the same general ratio, so the defense will  
9 have two extra, which would include alternates.

10 MR. DURKIN: Thank you.

11 THE COURT: Okay. Two extra, one extra, 8 and 12,  
12 8 and 12. Okay?

13 MR. DURKIN: Thank you.

14 MR. WARD: Your Honor, I apologize for not having  
15 raised this earlier, but --

16 THE COURT: Is that acceptable?

17 MR. WARD: -- it's a discovery matter.

18 THE COURT: Is that acceptable?

19 MS. MORENO: Mathematically, your Honor, it does  
20 improve the government's position actually.

21 THE COURT: It does improve --

22 MR. DRATEL: Thirteen and eight would be somewhat  
23 better proportions.

24 MR. COLE: Twelve and seven, your Honor.

25 MR. DRATEL: Twelve and seven, your Honor.

1                   THE COURT:  Twelve and seven?  All right.

2                   Everybody's in agreement that peremptories will be 12 and 7,  
3                   7 for the government, 12 defense.

4                   MR. WARD:  May I, your Honor --

5                   THE COURT:  Yeah.

6                   MR. WARD:  -- one discovery matter.  In light of  
7                   the Court's ruling that expert disclosure be concluded  
8                   tomorrow, we have an additional -- I think it's five or six  
9                   documents that Mr. Bryden authored at a time when he was a  
10                   contractor to the USAID, part of the Department of State.  
11                   And we've taken a look through those and they each contain  
12                   statements that would be relevant to his testimony on direct;  
13                   it's a lot of background information.  And the agency that he  
14                   wrote those for has asserted an interest in those documents  
15                   not being disclosed outside of the trial, their not being --  
16                   becoming public.  And I haven't had a chance to talk to each  
17                   of the defense counsel about this, but the Court did enter a  
18                   protective order for sensitive discovery back in February of  
19                   2011, and I think it would work to treat these five or six  
20                   documents, which I will call the USAID documents, as  
21                   sensitive discovery under the protective order from February  
22                   of 2011.  That way the defense counsel would have the ability  
23                   to review them, use them on cross-examination of Mr. Bryden  
24                   if it were appropriate, and at the conclusion of the  
25                   proceedings, they'd be returned to the government and they

1 would not be disclosed outside the proceedings.

2 THE COURT: Okay. It's all right with me if it's  
3 okay with the other side. When you meet and confer, you want  
4 to discuss that?

5 MR. DRATEL: We'll do that, your Honor.

6 MS. MORENO: We'll discuss that.

7 THE COURT: Okay. Thank you, Mr. Ward. I  
8 appreciate you raising that. Trial briefs. I assume you're  
9 already working on your trial briefs, you've got all the law  
10 together that you want, so I'd like to get those by the 18th,  
11 a week from -- yeah, like to get those by the 18th. Is that  
12 going to pose a problem for anyone?

13 MR. DRATEL: If we can get those the 21st, your  
14 Honor? We have a lot due on the 18th that we set up today in  
15 terms of a Friday --

16 THE COURT: Okay. File and serve by the 21st.  
17 Actually the 21st is a court holiday, but let's say the 22nd.

18 MR. DRATEL: Okay. Thank you, your Honor.

19 MS. MORENO: Thank you.

20 THE COURT: All right. I'd like your proposed jury  
21 instructions too by -- let's say the trial briefs by the  
22 22nd. Jury instructions I'd like to have ahead of time; I'd  
23 like to have those by the 25th.

24 MS. FONTIER: Your Honor, are you expecting us to  
25 confer with the government and submit a joint or are those

1 defense and government?

2 THE COURT: Any chance of having the two sides meet  
3 and confer on jury instructions? If not, you can make your  
4 submissions individually.

5 MS. FONTIER: Certainly easier to submit them  
6 individually.

7 MR. COLE: There's just a lot -- there's just a lot  
8 to do between now and then. We'll confer if we can, but I'd  
9 like to submit our own set.

10 THE COURT: All right. So jury instructions then  
11 by the 25th, trial briefs by the 22nd. Mr. Durkin, I'm going  
12 to ask you to do something with respect to your severance  
13 motion. I'd like you to file -- I'd like to give both sides  
14 an opportunity to file a short supplemental memorandum of  
15 points and authorities on the severance motion in light of  
16 how the case has developed and what representations you've  
17 heard in court today. Could you do that?

18 MR. DURKIN: Sure.

19 THE COURT: When do you think you could comfortably  
20 do that by?

21 MR. DURKIN: Probably have it by Thursday, Friday.

22 THE COURT: Friday, the 18th?

23 MR. DURKIN: Yes.

24 THE COURT: Okay. Mr. Cole, can you get something  
25 in by the 23rd?

1 MR. COLE: Yes.

2 THE COURT: Okay. Response by the 23rd. Thank  
3 you. Now, this is the last scheduled hearing we have until  
4 the trial goes forward on the 28th. We've done a lot of work  
5 today. Quite frankly, if all counsel were local, I'd have  
6 you back here one more time, probably on the -- well,  
7 sometime during next week -- not next week, it would be  
8 either the 18th or the 22nd. I'm willing to schedule another  
9 meeting if you'd like to have a status conference, but if  
10 not, then come the 28th, we're going to be picking and  
11 kicking.

12 MR. DURKIN: Would you consider doing one by phone,  
13 Judge?

14 THE COURT: I'd really be reluctant to do that. I  
15 think we get so much more done in person. If there's -- let  
16 me put it this way: If there's a need for a telephonic  
17 conference, if there's a true need for a telephonic  
18 conference, then we can schedule one. But if there are  
19 issues that come up that you can work on together -- just  
20 meet, confer, and resolve -- I'd appreciate that taking  
21 place. At the same time, I don't want to be -- none of us  
22 should be -- and I say this with respect -- ambushed at the  
23 very end here with issues, with problems that would in any  
24 way delay proceedings or throw a monkey wrench into the  
25 works. We've got all these people coming, potentially a

1 hundred or more people coming, and everybody's scheduled this  
2 to begin on the 28th. I just want to make sure that we begin  
3 on the 28th and we proceed seamlessly through without wasting  
4 any time with issues that could have been resolved ahead of  
5 time.

6 MS. MORENO: Your Honor, I know I and Mr. Dratel  
7 and perhaps other counsel, we will -- we're coming in on the  
8 24th. Perhaps the 25th, the Friday before, we could have a  
9 conference with your Honor. I think that's sort of the best  
10 we could do.

11 MR. COLE: I think that would be great. I'd prefer  
12 that over --

13 THE COURT: Okay.

14 MR. COLE: -- waiting until the morning of.

15 THE COURT: Okay. Then we'll set a status -- we'll  
16 set a status for January 25.

17 MR. DRATEL: Could we do it midday, your Honor; is  
18 that a --

19 THE COURT: Midday? How about 10:00 rather than --

20 MR. DRATEL: I don't want to make 10:00 because I  
21 have some --

22 THE COURT: When you say midday, what do you mean  
23 midday?

24 MR. DRATEL: I will take the earliest flight out  
25 here on the 25th -- I think I'm coming the morning of the

1 25th, and don't know if I can --

2 THE COURT: What's the earliest -- what's the  
3 earliest you could be here, Mr. Dratel, coming in, flying  
4 that day?

5 MR. DRATEL: My guess is -- it's sometimes hard to  
6 get direct flights nowadays, really it's --

7 THE COURT: You mean nonstops?

8 MR. DRATEL: Yeah, that's been -- it's been  
9 difficult just in terms of just what's available. I think  
10 any time after probably 11 a.m. is probably pretty good given  
11 that they usually start about 6:00, again, and if I get a  
12 6:00 6:30 flight.

13 THE COURT: Yeah, the flights out are -- they got 6  
14 a.m. flights out, and --

15 MR. DRATEL: Right and then I'd be here by 9:00,  
16 9:30 even with that, you know, assuming a delay in the  
17 airport --

18 THE COURT: Eleven a.m.?

19 MR. DRATEL: Eleven a.m. is good, your Honor.

20 THE COURT: If you're not here, we're going to wait  
21 for you, okay? So we'll say 11 a.m. on the 25th. Okay.  
22 Your pending motions --

23 MR. DURKIN: I'm sorry, your Honor. I have a  
24 sentencing that day. It may get moved, but --

25 THE COURT: You want to appear telephonically?

1                   MR. DURKIN: As a last resort. I think I can make  
2 it.

3                   THE COURT: If you can't, you can appear  
4 telephonically. I just want to -- it's better if we have  
5 people here.

6                   MR. DURKIN: That's fine.

7                   THE COURT: And if it's impossible for you, Mr.  
8 Durkin, we'll -- we can have you appear by phone.

9                   MR. DURKIN: I originally planned on coming on the  
10 26th because of that, so I may have --

11                  THE COURT: Okay. It's up to you. If you have  
12 another matter --

13                  MR. DURKIN: Thank you.

14                  THE COURT: I know it's on short -- short notice  
15 here. Okay. Pending motions are continued until the 25th of  
16 January. Let me just make sure that I've been through my own  
17 checklists here, everything's been covered. Okay. I think  
18 I've got everything. So we'll see you on the 25th, but  
19 before then, I'm going to be receiving a lot of paper, yeah,  
20 trial briefs, supplemental Ps and As on severance, be looking  
21 at a jury questionnaire, proposed voir dire. Okay. I think  
22 that does it.

23                  MR. COLE: Thank you.

24                  THE COURT: Thank you for your patience.

25                  (The proceedings were concluded.)

Certificate of Reporter

3 I hereby certify that I am a duly appointed, qualified, and  
4 acting Official Court Reporter for the United States District  
5 Court; that the foregoing is a true and correct transcript of  
6 the proceedings had in the mentioned cause on the date or  
7 dates listed on the title page of the transcript; and that  
8 the format used herein complies with the rules and  
9 requirements of the United States Judicial Conference.

10

11 | Dated February 27, 2014 at San Diego, California.

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/s/ Debra M. Henson (electronic)  
Debra M. Henson  
Official Court Reporter